INDEX

Subject Index

	Page
Jurisdiction	2
The ordinance, the validity of which is involved	2
Date of judgment or decree sought to be reviewed	3
Nature of the case	3
Cases relied upon believed to sustain jurisdiction	7
Grounds upon which it is contended the questions involved are substantial	7
Appendix—Opinion	10

Table of Cases Cited

City of Sherman v. *Sims*, 183 S. W. (2d) 415	8
Ellsworth v. *Gercke*, 156 Pac. (2d) 242	8
Green Bay & M. Canal Co. v. *Patten Paper Co.*, 172 U. S. 58, 19 S. Ct. 97, 43 L. Ed. 364	7
Hendley v. *State*, 141 Pac. (2d) 118	8
Marsh v. *Alabama*, 326 U. S. 501, 90 L. Ed. 265	8
People of the State of New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184	7
Roman Catholic Archbishop v. *Baker*, 15 P. (2d) 391	8
St. Louis, I. M. & S. R. Co. v. *Starbird*, 243 U. S. 592, 37 S. Ct. 462, 61 L. Ed. 917	7
State ex rel. Roman Catholic Bishop v. *Hill*, 90 Pac. (2d) 217	8
State ex rel. Synod of Ohio v. *Joseph*, 39 N. E. (2d) 515, 138 A.L.R. 1274	8
West Virginia State Board v. *Barnette*, 319 U. S. 624, 87 L. Ed. 1628	8
Whitney v. *California*, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095	7
Wilson v. *Cook*, 66 S. Ct. 663	7

Statutes Cited

City of Porterville, Ordinance No. 383	2
Judicial Code, Sec. 237(a) as amended—now 28 U.S.C. 2201(c)	2

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IN THE DISTRICT COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
STATE OF CALIFORNIA

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4 Civ. 3734

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A UTAH CORPORATION, SOLE,

Plaintiff and Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, AND ROSS GARDNER, AS BUILDING INSPECTOR, AND HAROLD COULTHURST, AS CITY MANAGER OF THE CITY OF PORTERVILLE, A MUNICIPAL CORPORATION,

Defendants and Respondents

STATEMENT OF BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION ON APPEAL.

Pursuant to Rule 12, Paragraph 1, of the Rules of the Supreme Court of the United States, appellant files this statement showing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

I

Jurisdiction

The Statute believed to sustain appellate jurisdiction is Section 237(a) of the United States Judicial Code, as amended by the Acts of February 13, 1925, Ch. 295, 43 Stat. 936; January 31, 1928, Ch. 14, 45 Stat. 54; and April 26, 1928, Ch. 440, 45 Stat. 466; Title 28 U. S. C. A. Sections 344a, 861a and 861b, superseded by Title 28 U. S. Code, Section 2201, subdivision (c).

II

The Ordinance, the Validity of Which Is Involved

The Ordinance of the City of Porterville, the validity of which is involved, was enacted under authority of Sections 6, 8 and 11 of Article XI of the Constitution of the State of California, which latter section directly confers upon municipal corporations authority "to make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws". The ordinance is City of Porterville Ordinance No. 383. The ordinance is printed and an official copy is on file with the Clerk of the City of Porterville. A copy of said zoning ordinance is attached hereto as Exhibit "A". The said zoning ordinance with respect to the erection of residences provides for four zones. R-1 (restriction of buildings to single family residences); R-2 (buildings covered by R-1 are permitted and in addition duplex or two family residences); R-3 (buildings covered by R-1 and R-2 are permitted and in addition apartment houses, hotels, boarding and lodging houses, clubs, lodges, fraternities, sororities, hospitals, etc.); R-4 (all uses in R-1-3 inclusive are permitted plus police stations, automobile stage stations, telephone exchanges, libraries, museums, schools, churches, etc.). Thus churches

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by the direct and explicit provisions of the ordinance are prohibited in the most desirable residential districts (to-wit, R-1, R-2 and R-3) and are relegated to the least desirable (to-wit, R-4), along with certain commercial and semi-commercial uses above mentioned. The petitioner's property is located in zone R-1.

III

The Date of Judgment or Decree Sought to Be Reviewed

The judgment sought to be reviewed is the decision of the District Court of Appeal, State of California, Fourth Appellate District, filed March 17, 1949. Timely petition for rehearing was filed on or about March 30, 1949 and was denied April 13, 1949. Petition for hearing by the Supreme Court of California was filed April 20, 1949 and denied May 12, 1949. This application for appeal is presented on the 17th day of June, 1949.

IV

The Nature of the Case

The petitioner, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, a Utah corporation sole, applied to the City of Porterville, through its proper city officials, for permission to erect a church for religious worship on property owned by it located in said City of Porterville. The application and the plans and specifications of the proposed building conformed in all respects to the building code of the City of Porterville. The City of Porterville refused to issue the permit on the ground that the zoning ordinance of the City of Porterville prohibited the building of a church on the property.

The petitioner, upon the refusal of defendants to issue it a building permit, applied for a writ of mandate to the Superior Court of the State of California to compel issuance of a building permit to erect a church for religious worship,

charging violation of due process and an invasion of the freedom of religious worship. A demurrer to the petition for writ of mandate was sustained without leave to amend and judgment was entered against the petitioner. The District Court of Appeal affirmed the judgment.

The validity of the zoning ordinance was raised in the court of first instance by the pleadings which referred to the federal questions, alleging the petitioner's ownership of the property, its application for a building permit, the refusal by reason of the ordinance which was pleaded in full, and specifically calling attention to the constitutional challenge; that the ordinance is unconstitutional and void and without any substantial relation to the public health, safety, morals or general welfare, and that the ordinance "as applied to the petitioner so as to prevent it from constructing a church on said property, constitutes a deprivation of petitioner's property without due process of law in violation of . . . Section 1 of the Fourteenth Amendment of the Constitution of the United States" (Clerk's Tr. pp. 1-6). The federal question was further raised by oral argument in opposition to the demurrer to the petition for writ of mandate. In the argument on demurrer, counsel for defendants argued in part:

> "Now, it is best we read the Complaint. We gather that the sole legal attack made in this case upon the action of the City of Porterville in standing upon its ordinance and denying a building permit for a structure and the uses attached thereto which are not permitted in that Zone is on the proposition that any ordinance which purports to assign a specific portion of the residential area for the uses of churches and public buildings by city churches, is therefore, and because of that fact, unconstitutional and void." (Rep. Tr. p. 7, lines 17 to 25)

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At that time, counsel for plaintiff and appellant argued:

> "Mr. Harmon: Now, if your Honor please, we take it on general Demurrer, we take is as correct, the proposition that Counsel has made, that this case rests squarely on the general issue as to whether or not a church can be thus zoned against. There will be facts brought in later on in the hearing on the merit, to disclose this arbitrary and unreasonableness, in our opinion, which are additional grounds and apart and aside from the fact, it is our contention right now, raised squarely, that a Zone ordinance which restricts churches from a residence area is unconstitutional * * *." (Clerk's Tr. p. 26, line 21 to p. 27, lines 1 to 4)

The constitutional question was the only question urged and the court of first instance, in sustaining the demurrer without leave to amend, stated in part:

> "It is the conclusion of the Court that the ordinance is reasonable and not discriminatory, reasonable exercise of police power and I think that the Demurrer should be sustained. I expect, of course, no matter what the decision of the Court is, that the case will be carried to the higher court and I think the record is such that everything is before the Court which would be necessary for a ruling by the higher court and for the [that] reason the ruling will be that the Demurrer will be sustained, without leave to amend, that the alternative Mandate, that the Petition for Writ of Mandate be denied and Alternative Writ be discharged." (Rep. Tr. p. 84, lines 5-15)

The federal question was raised in the District Court of Appeal of the State of California, Fourth Appellate District, in appellant's opening and closing briefs. The appellant's position in the District Court of Appeal was as follows:

> "Specifically, therefore, the question to be decided by the court is the validity of the Porterville zoning

statute as applied to prevent the appellant from constructing a church on its property * * *.

"It is appellant's position that this zoning Ordinance as applied to appellant to prevent its construction of a church for religious worship upon its property is invalid because it is in violation of the State and Federal Constitutions (see Section 13, Article I, California Constitution; see also Article I, Section 4, California Constitution; Section I, Fourteenth Amendment U. S. Constitution) on two grounds, each of which is sufficient alone to invalidate the ordinance: First, it is submitted that the Porterville zoning ordinance as so applied is invalid because it bears no substantial relation to the public health, safety, morals and general welfare, and thus is beyond the police power of the State to enact. Second, the ordinance is invalid because the application of the ordinance to petitioner results in a restriction of religious worship in the absence of any grave or imminent danger justifying such restriction."

The points argued by appellant in its opening brief before the District Court of Appeals were as follows:

1. The Porterville zoning ordinance is invalid because it has no substantial relation to the public health, safety, morals or general welfare.

2. The Porterville ordinance is invalid because there was no grave or immediate danger justifying restriction of churches in residential districts.

The District Court of Appeal ruled adversely to the appellant on both points. It ruled that the Porterville zoning ordinance was not unconstitutional in that it bore a substantial relation to the public health, safety, morals and general welfare, and ruled further that it was not an unwarranted restriction of religious worship. Copies of the opinion of the court of first instance and of the opinion of the District Court of Appeal above referred to are attached hereto as Exhibits "B" and "C" respectively.

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V

The Cases Relied upon Believed to Sustain Jurisdiction

Where the state court of final resort in the case has entertained the question as to whether a state statute (or ordinance as the case may be) is repugnant to the Constitution of the United States and held that such statute was not repugnant and that the statute was valid, the Supreme Court of the United States has jurisdiction by appeal to review the decision of said state court.

People of the State of New York ex rel. Bryant v. *Zimmerman,* 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184;

Green Bay & M. Canal Co. v. *Patten Paper Co.,* 172 U. S. 58, 19 S. Ct. 97, 43 L. Ed. 364;

St. Louis I. M. & S. R. Co. v. *Starbird,* 243 U. S. 592, 37 S. Ct. 462, 61 L. Ed. 917;

Whitney v. *California,* 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095;

Wilson v. *Cook,* 66 S. Ct. 663, (Decided March 4, 1946).

VI

Grounds upon Which It Is Contended the Questions Involved Are Substantial

The District Court of Appeal of the State of California, in concluding that the ordinance of the City of Porterville (prohibiting the construction of churches in residential districts) "bears a substantial relation to the public health, safety, morals and general welfare because it tends to promote and perpetuate the American home and protect its civil and social values," ruled said ordinance valid despite the constitutional guarantee of due process. This it is believed was erroneous and it is contended that such ruling presents a substantial federal question. The appellate courts of other

states which have dealt with similar ordinances have in all instances held such ordinances unconstitutional as violative of due process.

City of Sherman v. *Sims* (Texas), 183 S. W. (2d) 415, Aff'g 181 S. W. (2d) 100;
Ellsworth v. *Gercke* (Ariz.), 156 Pac. (2d) 242;
Roman Catholic Archbishop v. *Baker* (Ore.), 15 P. (2d) 391;
State ex rel. Roman Catholic Bishop v. *Hill* (Nev.), 90 Pac. (2d) 217;
State ex rel. Synod of Ohio v. *Joseph* (Ohio), 39 N. E. (2d) 515, 138 A. L. R. 1274.

It is further contended that a substantial federal question is involved inasmuch as it is believed that the ordinance does in effect restrict the freedom of religious worship. If so, then such ordinance was invalid unless there was a grave or immediate danger to interests which the state might protect under its police power.

Marsh v. *Alabama*, 326 U. S. 501, 90 L. Ed. 265;
West Virginia State Board of Education v. *Barnette*, 319 U. S. 624, 87 L. Ed. 1628;
Hendley v. *State*, 141 Pac. (2d) 118.

To summarize, briefly, it is contended that the state court's decision upholding the ordinance which bars the construction of churches in the most desirable residential sections of the city and relegates them with semi-commercial institutions to the least desirable residential sections, involves substantial federal questions, viz.:

(a) Such restriction has no substantial relation to the public health, safety, morals and general welfare and thus constitutes the taking of property in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

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(b) Such restriction resulted in an unwarranted restriction of religious worship in violation of Section 1 of the Fourteenth Amendment protecting the freedom of liberty.

Dated this 17th day of June, 1949.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
By JOHNSON, HARMON, STIRRAT & HENDERSON,
Its Attorneys.

APPENDIX

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Civil No. 3734

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (a Utah Corporation Sole), *Plaintiff and Appellant,*

vs.

CITY OF PORTERVILLE (a Municipal Corporation), et al., *Defendants and Respondents*

OPINION

This appeal is from a judgment dismissing plaintiff's petition for writ of mandate. The judgment was based on an order sustaining the demurrer of defendants to the petition without leave to amend, dismissing the same and quashing the alternative writ of mandate theretofore issued.

The plaintiff, by its petition for a writ of mandate, sought to compel the defendants to issue a permit for the construction of a church on property owned by plaintiff in the city of Porterville. Plaintiff alleged that its application to erect a church upon its property was duly filed with the proper city officials and that defendant city building inspector refused to issue a permit for the erection of the church on the ground that the property involved was zoned by the city solely for the erection of single family dwellings.

A copy of the zoning ordinance of the city of Porterville was attached to the petition. By its provisions, as far as applicable here, the city was zoned as follows: R-1, wherein buildings are restricted to single family residences; R-2, to duplex or two-family residences; R-3, to multiple residences, and R-4, to permit unlimited residences. In R-1, only single family dwellings may be erected; in R-2, there are permitted all uses that are permitted under R-1, plus duplexes and two-family residences; in R-3, all uses of R-1

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and R-2 are permitted, plus apartment houses, multiple family dwellings, hotels, boarding and lodging houses, clubs, fraternities, sororities, hospitals, etc. In R-4 called "unlimited residence," all uses of the preceding zones are permitted, plus libraries, museums, schools, churches and religious institutions, etc.

At the time the property was acquired by plaintiff it was partly within the city and thereafter was taken within the city limits and included in an area limited in its use to single family dwelling units, being zone R-1. Plaintiff's application for a building permit stated that the use and occupancy to which the building was to be put was "to provide a chapel and classrooms for religious worship and study and accommodations for youth activities and other church activities."

Plaintiff's contention is that the zoning ordinance as applied to plaintiff to prevent its construction of a church for religious worship upon its property is invalid because, as so applied, it bears no substantial relation to the public health, safety, morals and general welfare and thus is beyond the police power of the state to enact, and further, because the application of the ordinance to petitioner results in a restriction of religious worship in the absence of any grave or imminent danger justifying such a restriction. The precise question of whether or not there may be established, as a part of a comprehensive zoning plan, strictly private residential districts from which churches are excluded and in which they are prohibited, has apparently not been decided in this state; however, it has been held that general business enterprises, apartments, tenements and like structures may be excluded and prohibited in private residential districts. (Miller *v.* Board of Public Works, 195 Cal. 477, 490 [234 P. 381, 38 A.L.R. 1479].) As was said in Wilkins *v.* City of San Bernardino, 29 Cal. 2d 332, 337 [175 P.2d 542]:

"It is well settled that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power, and that the establishment, as part of a comprehensive and systematic plan, of districts devoted to strictly private residences or single family

dwellings, from which are excluded business or multiple dwelling structures, is a legitimate exercise of the police power. See Jones *v.* City of Los Angeles, 211 Cal. 304, 307 [295 P. 14]; Miller *v.* Board of Public Works, 195 Cal. 477, 490 [234 P. 381, 38 A.L.R. 1479]. • • • Every intendment is in favor of the validity of the exercise of police power, and, even though a court might differ from the determination of the legislative body, if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be within the purview of the police power. (Citing cases.)"

In Miller *v.* Board of Public Works, supra, at page 492, it was said:

"There are some decisions which do not uphold the validity of a zoning ordinance establishing strictly residential districts. We are of the opinion, however, that the better reasoned cases are in favor of the validity of comprehensive zoning which establish strictly private home districts, and that the most which can be said of the cases to the contrary is that they merely show that this is a question upon which reasonable minds may differ."

We are in accord with this view and we conclude that since the city had power to zone the property herein affected, strictly for single family dwellings, there was no abuse of the power in prohibiting the erection and construction of church buildings therein. It is a matter of common knowledge that people in considerable numbers assemble in churches and that parking and traffic problems exist where crowds gather. This would be true particularly in areas limited to single family dwellings. There necessarily is an appreciable amount of noise connected with the conduct of church and "youth activities." These and many other factors may well enter into the determination of the legislative body in drawing the lines between districts, a determination primarily the province of the city.

A single family residence may be much more desirable when not in an apartment house neighborhood or adjacent to a public building such as a church. The municipal legis-

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lative body may require that church buildings be erected to conform to health and safety regulations as provided in its building code and we see no reason to hold that churches may be erected in a single family residential area when a duplex, triplex, or other multiple dwelling can lawfully be excluded therefrom. The provision in the ordinance for a single family residential area affords an opportunity and inducement for the acquisition and occupation of private homes where the owners thereof may live in comparative peace, comfort and quiet. Such a zoning regulation bears a substantial relation to the public health, safety, morals and general welfare because it tends to promote and perpetuate the American home and protect its civic and social values.

We find no merit in plaintiff's contention that the application of the ordinance to the plaintiff results in an unwarranted restriction of religious worship. The petitioner is not a congregation, but holds its property as a corporation sole, the existence of which depends upon the laws of the state. Having such right from the state, the enjoyment of the property is subject to reasonable regulations. The denial of a building permit did not prohibit anyone from religious worship and there is nothing in the record before us to indicate that the church building could not be erected if located in the area zoned for that purpose.

The petition fails to state a cause of action in that the facts alleged do not show that the ordinance in question is unreasonable and void as applied to plaintiff. The allegations are:

"That said zoning ordinance as applied to your petitioner so as to prevent your petitioner from erecting a church on the above mentioned property, is unconstitutional and void, in that said ordinance is arbitrary and unreasonable and is without any substantial relation to the public health, safety, morals or general welfare; that said ordinance is not based upon a finding by the governing body of the city of Porterville that such zoning is necessary to the public health, safety, morals or general welfare of the community. That said ordinance * * * is not based on the general welfare of the community and does not tend to preserve or pro-

mote the public health, safety, or morals, and constitutes an arbitrary exclusion of a church, * * * That said ordinance * * * constitutes a deprivation of petitioner's property without due process of law. * * *"

Matters of fact necessary to support the legal conclusions alleged are not stated, and the petition therefore states no cause of action. (Wilkins *v.* City of San Bernardino, supra, p. 344.)

The burden is upon the plaintiff to allege and prove physical facts from which the court could conclude as a matter of law that the ordinance was unreasonable and invalid. (Wilkins *v.* City of San Bernardino, supra, p. 338.)

In enacting zoning ordinances, the municipality performs a legislative function and every intendment is in favor of the validity of such ordinances. (Jardine *v.* City of Pasadena, 199 Cal. 64, 72-73 [248 P. 225, 48 A.L.R. 509].) It is presumed that the enactment as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare. (Lockard *v.* City of Los Angeles,[1] 33 Cal. 2d —, — [202 P.2d 38].)

There is reasonable justification for the action of the defendant city in prescribing the buildings which may be erected and constructed in the zone established for single family residences and in such cases the wisdom of the prohibitions and restrictions is a matter for legislative determination. (Lockard *v.* City of Los Angeles, supra, p. 435.)

Plaintiff argues that the trial court should not have sustained the demurrer to the petition without leave to amend. The plaintiff, however, did not request leave to amend and the judgment contains a recital that petitioner "advised the Court that leave to amend would be futile." Plaintiff's contention in the trial court was as stated in its reply brief—"That the prohibition of churches in virtually all residential zones is on its face not a proper exercise of the police power, and that it violates the constitutional immunity of freedom of religious worship."

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[1] Advance Report Citation: 33 A.C. 427, 434.

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Where, as here, plaintiff elected to stand on the allegations of the petition, and declined to amend it, informing the court that amendment would be "futile," it cannot be held that there was an abuse of discretion in the ruling of the trial court.

Judgment affirmed.

MUSSELL, J.

Barnard, P. J., and Griffin, J., concurred.
Filed March 17, 1949, E. J. Verdeckberg, Clerk.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 245

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A UTAH CORPORATION, ET AL.

Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

ANSWER TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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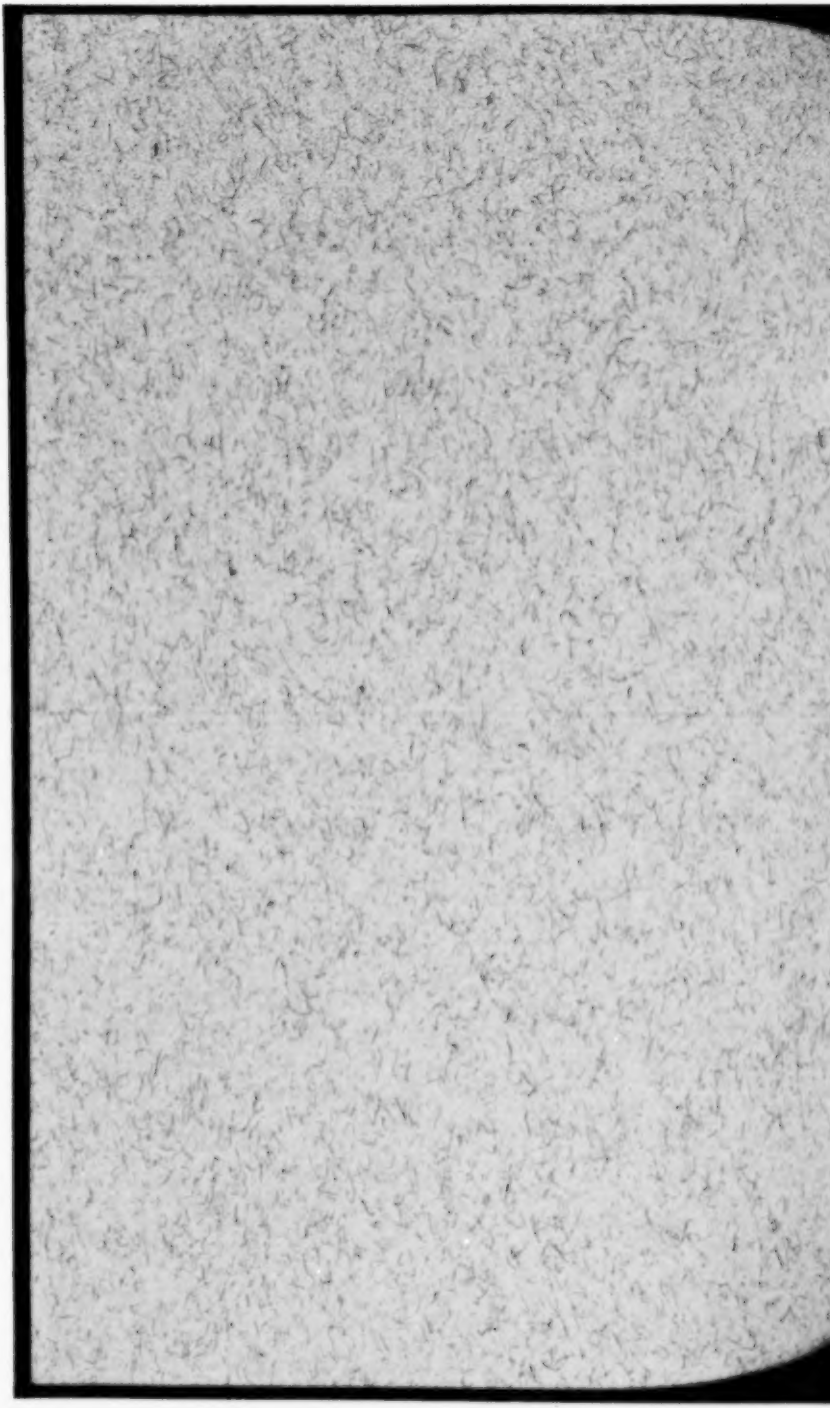

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IN THE DISTRICT COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
STATE OF CALIFORNIA

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4 Civ. 3734

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A UTAH CORPORATION, ET AL.

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Defendants and Respondents.

ANSWER TO APPELLEES' STATEMENT OF MATTERS AND GROUNDS MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES; AND MOTION TO DISMISS APPEAL, OR IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT HEREIN

The argument in Appellees' Statement of Matters and Grounds Making Against Jurisdiction of the Supreme Court of the United States; and Motion to Dismiss Appeal, or in the Alternative, to Affirm the Judgment Herein, is

all directed to the merits, which we believe should be more fully and appropriately answered in the briefs. The arguments only serve to show the existence and great importance of the question involved and to demonstrate the necessity of obtaining the decision of the Supreme Court of the United States on the question. We respectfully refer to Appellant's *"Statement of Basis Upon Which It Is Contended That the Supreme Court of the United States Has Jurisdiction on Appeal"*, and particularly Subdivision IV, *"The Nature of the Case"* and Subdivision VI, *"Grounds Upon Which It Is Contended the Questions Involved Are Substantial"*.

Briefly, however, we may point out that the petitioner applied to the City of Porterville for permission to erect a church for religious worship on property owned by it and located in the City of Porterville. The defendants refused to issue the building permit, on the ground that its ordinance forbade it. Petitioner applied for a writ of mandate, attacking the ordinance, pleaded in full, and calling the court's attention specifically to the constitutional challenge of due process and invasion of the freedom of religious worship. The decision of the Superior Court specifically upheld the validity of the ordinance over the constitutional objection. The decision of the District Court of Appeal affirmed the trial court, specifically ruling on the constitutional question.

The appellate courts of other states in all cases where they have dealt with similar ordinances have held such ordinances unconstitutional as violative of due process.

City of Sherman v. *Sims* (Texas, 183 S.W. (2d) 415, aff'g 181 S.W. (2d) 100;

Ellsworth v. *Gercke* (Ariz.), 156 Pac. (2d) 242;

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State ex rel. Roman Catholic Bishop v. *Hill* (Nev.), 90 Pac. (2d) 217;

State ex rel. Synod of Ohio v. *Joseph* (Ohio), 39 N.E. (2d) 515, 138 A.L.R. 1274.

The challenge is to the validity of the ordinance of the City of Porterville in its sweeping prohibition of any and all churches from preferred residential districts of the city as being an improper exercise of the police power and also as an invasion of religious freedom. We note appellees' use the timeworn argument that since the police power of the state might in some instances regulate church structures, power to regulate exists in all cases. Under such argument, appellees would entirely disarm the constitutional guarantees. Appellees argue that the courts "should render unto Caesar that which is Caesar's and unto God which is God's" and thus grant the state the unlimited power of regulation which of course would include the power to destroy.

We note also that appellees argue that religion is no more necessary to life than water, and that that does not give water production a preferred place in a residential section of the city. We question this analogy. The segregation of water production to remote districts does not appear analogous to the like segregation of churches which are intimately connected with home and family life.

The case of *Euclid* v. *Ambler Realty Company*, 272 U. S. 365, relied upon by appellees, is decisive of the point against them that there is a substantial federal question here involved. It also shows that the question was not passed on in that case, the court deliberately avoiding passing on it because it was not therein raised. The court had under consideration a zoning ordinance of the general nature here involved. In holding that ordinance to be generally valid, it expressly made note that no issue was raised as to the

proviso in the ordinance restricting churches, schools, libraries and other public and semi-public buildings; for that reason it refused to consider the question which is here now squarely presented to this court for the first time, namely, may the police power to protect the public health, safety and morals, or the general welfare clause, be invoked to prohibit the erection of churches in residential zones? Since the *Euclid* case, this question has come up in various aspects in several states, but never until now has it reached this court. In each of the state court decisions until the present case, as noted supra, the result has been to deny the extension of the police power to thus dictate where churches might be erected.

Respectfully submitted this 26th day of July, 1949,

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

By JOHNSON, HARMON, STIRRAT & HENDERSON,

Its Attorneys.

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SUPREME COURT OF THE UNITED STATES

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Appellant,

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CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Counsel for Appellees.

WALDO E. BURFORD,
Of Counsel.

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INDEX

Subject Index

	Page
State action the validity of which is assailed	2
Questions raised before the state courts	4
The judgment resting on a valid non-federal ground as well as a federal ground, it should be affirmed, or the appeal dismissed	5

Table of Cases Cited

Acker v. *Baldwin*, 18 Cal. (2d) 345	9
Brown v. *Union Pac. R. Co.*, 267 U. S. 255, 69 L. Ed. 601	6
City of New Orleans v. *New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943, 12 S. Ct. 142	6
Commercial Bank v. *Rochester*, 82 U. S. (15 Wall.) 639, 21 L. Ed. 117	6
Crary v. *Devlin*, 92 U. S. 397, 23 L. Ed. 510	8
DeLano v. *City of Tulsa*, 26 F. (2d) 640, cert. den. 278 U. S. 654, 73 L. Ed. 564	7, 8, 14
Dundee Realty Co. v. *Omaha*, 13 N. W. (2d) 634	9
Ellsworth v. *Gercke*, 156 P. (2d) 242	10
Euclid v. *Ambler Realty Co.*, 272 U. S. 365	6, 7, 8, 14
Eustis v. *Bullis*, 150 U. S. 361, 37 L. Ed. 1111, 14 S. Ct. 131	6
Everson v. *Board of Education*, 91 L. Ed. 472, 67 S. Ct. 504	12
Giles v. *Teasley*, 193 U. S. 146, 48 L. Ed. 655	6
Hadacheck v. *Sebastian*, 239 U. S. 394, 60 L. Ed. 348, 36 S. Ct. 143	7
Hague v. *Comm. Ind. Organization*, 307 U. S. 496	11
Koch v. *City of Toledo*, 37 F. (2d) 336	14
Laurel Hill Cem. Ass'n v. *San Francisco*, 216 U. S. 358, 54 L. Ed. 515	7
Leventhal v. *District of Columbia*, 100 F. (2d) 94, 69 App. D. C. 229	6
Lockhard v. *Los Angeles*, 33 Cal. (2d) —, 33 Adv. Cal. 427, 202 P. (2d) 38	10

Page

Marblehead Land Co. v. *City of Los Angeles*, 47 F. (2d) 528, cert. den. 284 U. S. 634, 76 L. Ed. 740 .... 8, 14
Nectow v. *Cambridge*, 277 U. S. 183, 72 L. Ed. 842 .... 8, 14
Pacific States Box & Basket Co. v. *White*, 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A.L.R. 853 .... 5, 7, 9
Radice v. *New York*, 264 U. S. 292, 68 L. Ed. 690 8
Radio Station WOW v. *Johnson*, 326 U. S. 120, 89 L. Ed. 2092 6
Roman Catholic Archbishop v. *Baker*, 15 P. 2d 391 10
Roman Catholic Archbishop v. *Hill*, 90 P. (2d) 217 10
Sherman v. *Sims*, 183 S. W. (2d) 415 9
State v. *City of New Orleans*, 154 La. 271, 97 So. 440 9
State v. *Houghton*, 273 U. S. 671, 71 L. Ed. 832 14
State ex rel. Berry v. *Houghton*, 204 N. W. 569, aff'd 273 U. S. 671, 71 L. Ed. 832 7
State ex rel. Hacharedi v. *Baxter*, 74 N. E. (2d) 242 10
State ex rel. Synod of Ohio v. *Joseph*, 39 N. E. (2d) 515, 138 A.L.R. 1274 10
Sunny Slope Water Co. v. *Pasadena*, 1 Cal. (2d) 87 15
Washington ex rel. Seattle Trust Co. v. *Roberge*, 278 U. S. 116, 72 L. Ed. 210 7
Welch v. *Swasey*, 214 U. S. 91, 53 L. Ed. 923 7
West Virginia State Board v. *Barnette*, 319 U. S. 624, 87 L. Ed. 1628 12
Wilkins v. *City of San Bernardino*, 29 Cal. (2d) 332 5
Zahn v. *Board of Public Works*, 274 U. S. 325 .... 8, 14

STATUTES CITED

California Constitution, Art. XI, sec. 8 2
California Constitution, Art. XI, sec. 11 2
California Stats. 1935, p. 2172 2
California Stats. 1935, p. 2202 2
Constitution of the United States, Amendment XIV, section 1 11
28 U.S.C. 43 11

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IN THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT. STATE OF CALIFORNIA

Civ. 3734

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A UTAH CORPORATION, SOLE,

Plaintiff and Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, AND ROSS GARDNER, AS BUILDING INSPECTOR, AND HAROLD COULTHURST, AS CITY MANAGER OF THE CITY OF PORTERVILLE, A MUNICIPAL CORPORATION,

Defendants and Respondents

APPELLEES' STATEMENT OF MATTERS AND GROUNDS MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES; AND MOTION TO DISMISS APPEAL, OR IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT HEREIN.

I

Pursuant to Rule 12, Paragraph 3, Rules of the Supreme Court of the United States, appellees file this statement, disclosing the matters and grounds making against the jurisdiction of the United States Supreme Court asserted

by appellant; and hereby move to dismiss the appeal, or in the alternative, move to affirm the judgment appealed from.

II

State Action, the Validity of Which Is Assailed

California Constitution, Art. XI, sec. 8 provides for establishing chartered cities, which shall have autonomy in municipal affairs. Under this authority, the city of Porterville received its charter (Cal. Stats. 1935, p. 2172) which charter provides in Sec. 71 (Cal. Stats. 1935 at p. 2202):

> "Sec. 71. The City of Porterville is hereby declared to be primarily a residential city and the council shall have the power to establish such zoning systems within the city as may in its judgment be most beneficial, and in such zoning systems may prohibit the erection or maintenance of any class or classes of buildings within certain areas, and may classify and reclassify the zones established . . ."

Such provision was adopted by the electorate of the City of Porterville, and ratified by the legislature, as provided in California Constitution, Art. XI, sec. 8. Likewise, California Constitution Art. XI sec. 11 confers on all cities the power "to make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws," and this is an additional source of constitutional authorization.

Ordinance #383 of the City of Porterville provided for four residential zones: R-1, single family residence; R-2, duplex or two-family residences, plus R-1 uses; R-3 apartment houses and multiple family residences, plus R-1 and R-2 uses; and R-4, unlimited residence zone, including libraries, schools, churches, museums as well as R-1, R-2, and R-3 uses. Actually, three residential zones were set up in adoption of the zoning plan, consolidating R-3 and R-4;

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plus one business, and one manufacturing zone. (Clks. Tr. p. 20, Zoning Map.)

Compare ordinance under consideration in Euclid v. Ambler Realty Company, 272 U. S. 365, 380-383, wherein the residence zone U-3, classified churches, schools, museums, libraries and other public or quasi-public uses for use therein.

In the language of the Court: "U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries and truck gardening; U-2 is extended to include two family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds and recreation buildings and a city hall and courthouse . . ."

Compare also the ordinance before the Court in Zahn v. Board of Public Works, 274 U. S. 325, which involved five zones, in which the second residential zone "B" (described in the opinion p. 327) included "residential purposes, churches, private clubs, educational and similar purposes."

The Zoning Map by which the limits of the zones were fixed was adopted July 16, 1940. (Clerks Tr. p. 20 Exhibit 1). Petitioner-appellant acquired its property after the passage of the ordinance on March 19, 1945. While the complaint (Par. III clks. tr. pp. 2-3) would indicate that the property was then outside of the limits of the city and thereafter was annexed and zoned as R-1, it was stipulated that at the time of purchase, the city boundary ran through the lot, it then being partially in R-1, and that by the annexation, all of the lot became R-1 (Rep. tr. p. 8, l. 6-20).

III

Questions Raised Before the State Courts

Appellant in its statement relative to the basis of jurisdiction (point IV) has indicated its contention of law. Before the District Court of Appeal, State of California, appellant in its Reply Brief (page 5) thus stated the issue:

> "There is not here posed, therefore, a question of arbitrary or discriminatory action under an ordinance conceded to be generally valid but claimed to be unreasonable as sought to be enforced with respect to a particular piece of property. Rather, the contention here is that the prohibition of churches in virtually all residential zones is on its face not a proper exercise of the police power, and that it violates the constitutional immunity of freedom of religious worship."

Under well-established California authority, the trial court and District Court of Appeal decided that it could not be said that on its face the ordinance was invalid per se as an exercise of the police power, in classifying churches with other public buildings and quasi-public buildings as an R-¾ use, and not permitting such use in an R-1 zone; nor was such an ordinance unconstitutional per se for want of due process of law by reason of any claimed impairment of worship "prohibiting the free exercise thereof." This is not a case where a worshipper claims interference by the State with his religious practices or beliefs. It is a case where a corporate property owner seeks immunity from civil authority on the ground that it, if permitted, will devote the property to religious purposes. The District Court of Appeal stated in its opinion:

> "We find no merit in plaintiff's contention that the application of the ordinance results in an unwarranted restriction of religious worship. The petitioner is not

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a congregation, but holds his property as a corporation sole, the existence of which depends upon the laws of the State. Having such right from the State, the enjoyment of the property is subject to reasonable regulations. The denial of a building permit did not prohibit any one from religious worship and there is nothing in the record before us to indicate that the church building could not be erected if located in the area zoned for that purpose."

The basic attack upon appellant's complaint in the California courts was, however, that it did not state facts sufficient to constitute a cause of action. The allegations essential to set up denial of due process, and the allegedly arbitrary and unreasonable character of the ordinance in its application to petitioner's property were in the form of legal conclusions, which under the well-established rules of pleading in such matters were insufficient to state a cause of action. The opinion of the District Court of Appeal sets forth the charging allegations, and holds them insufficient, citing *Wilkins* v. *City of San Bernardino*, 29 Cal. (2d) 332, 344.

IV

The Judgment Resting on a Valid Non-Federal Ground as Well as a Federal Ground, It Should Be Affirmed, or the Appeal Dismissed.

The appellant's complaint in this case, held insufficient as a matter of pleading by the California courts, would have been held insufficient in a federal court. The burden of proving that a legislative act within the scope of the police power is arbitrary is not sustained by making general conclusions of law, but facts relied upon to rebut the presumption of constitutionality must be set forth specifically:

Pacific States Box & Basket Co. v. *White*, 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853;

Leventhal v. *District of Columbia,* 100 F. (2d) 94, 69 App. D. C. 229 (zoning case).

The determination of this matter of pleading was sufficient to dispose of the entire case, on an independent non-federal ground, aside and apart from the legal conclusions asserting an alleged violation of federal right:

Commercial Bank v. *Rochester,* 82 U. S. (15 Wall) 639, 21 L. Ed. 117;

Radio Station WOW v. *Johnson,* 326 U. S. 120, 129, 89 L. Ed. 2092, 2100;

Giles v. *Teasley,* 193 U. S. 146, 48 L. Ed. 655;

City of New Orleans v. *New Orleans Waterworks Co.,* 142 U. S. 79, 35 L. Ed. 943, 12 S. Ct. 142;

Eustis v. *Bollis,* 150 U. S. 361, 37 L. Ed. 1111, 14 S. Ct. 131;

Brown v. *Union Pac. R. Co.,* 267 U. S. 255, 69 L. Ed. 601.

(B) The *general* attack made upon the ordinance is without merit as a substantial federal question, having been set at rest by previous decisions of the Court:

As indicated in paragraph II, supra, the Porterville ordinance, as do hundreds of ordinances throughout the United States, follows the general zone divisions adjudicated in *Euclid* v. *Ambler Realty Company,* 272 U. S. 365, 380-383. That case involved a general attack on the validity of the ordinance. The Court stated (p. 385): "Specifically, there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries and other public and semi-public buildings," and the court further stated, "we cannot assume the existence of facts which would justify an injunction upon this record in respect to this class of restriction."

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The general power to zone being beyond question, the ordinance in its general scope must be declared valid.

Washington ex rel. Seattle Trust Co. v. *Roberge*, 278 U. S. 116, 120, 72 L. Ed. 210, 213.

It would be competent to consider whether the details of the zoning plan, applied to the particular premises, make them unreasonable or arbitrary, if the facts alleged would permit.

Euclid v. *Ambler Realty Co.*, 272 U. S. 365, 395, 72 L. Ed. 303, 314.

But appellant's failure to plead facts precludes application of this principle. On demurrer, it is impossible to consider plaintiff's property in relation to others, or in relation to the general zoning plan.

Cf. *DeLano* v. *City of Tulsa*, 26 F. (2d) 640, 645, cert. den. 278 U. S. 654, 73 L. Ed. 564;

Hadacheck v. *Sebastian*, 239 U. S. 394, 412, 60 L. Ed. 348, 36 S. Ct. 143, 146.

It is presumed that the legislative body investigated and found conditions such that the legislation enacted was reasonable and appropriate:

State ex rel. Berry v. *Houghton*, 204 N. W. 569, 571 aff'd 273 U. S. 671, 71 L. Ed. 832;

Pacific States Box & Basket Co. v. *White*, 296 U. S. 176, 185, 80 L. Ed. 138.

Great weight is given to the determination of the local body familiar with local conditions:

Welch v. *Swasey*, 214 U. S. 91, 106, 53 L. Ed. 923;

Laurel Hill Cem. Ass'n v. *San Francisco*, 216 U. S. 358, 365, 54 L. Ed. 515.

The situation is akin to those cases in which the facts upon which the appellant relied to bring a federal statute into

operation were found not to exist by the lower court, with the result that the motion to dismiss the appeal was granted:

Crary v. *Devlin*, 92 U. S. 397, 23 L. Ed. 510 (see 154 U. S. 619).

We therefore submit that the case is within the rule announced by the Court in *Zahn* v. *Board of Public Works*, 274 U. S. 325. Therein, it was held that a comprehensive zoning ordinance regulating the character of buildings which lawfully might be erected in designated districts is not repugnant to the due process of law and equal protection clauses of the 14th Amendment; and that the determination of a city council that a certain district shall be included within a particular classification of comprehensive zoning plans will not be disturbed, if the question whether the plan was unreasonable, arbitrary or an unequal exercise of power is fairly debatable.

Radice v. *New York*, 264 U. S. 292, 68 L. Ed. 690;
Euclid v. *Ambler Realty Co.*, 272 U. S. 365, 388;
Marblehead Land Co. v. *City of Los Angeles*, 47 F. (2d) 528, cert. den. 284 U. S. 634, 76 L. Ed. 740;
Nectow v. *Cambridge*, 277 U. S. 183, 72 L. Ed. 842.

Since appellant purchased its property after the zoning restriction was in effect, it cannot be urged that the effect of the ordinance is to take appellant's property without due process of law; even if appellant purchased in the mistaken belief of the invalidity of the ordinance or that the property was outside the city:

DeLano v. *City of Tulsa*, 26 F. (2d) 640, 645, cert. den. 278 U. S. 654, 73 L. Ed. 564.

The statement of appellant in its *Statement of Basis* etc. pp. 7-8 that "The appellate courts of other states which have dealt with similar ordinances have in all instances held

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such ordinances unconstitutional as violative of due process" is a glittering half-truth. The major "similarity" of such ordinances was that they involved churches; the crucial determination of *lack of due process* rested upon bases utterly lacking in the instant case.

The property concerned in *Sherman* v. *Sims* (Tex.) 183 S. W. (2d) 415, aff'g 181 S. W. (2d) 100, was a house, already constructed and within the prohibited zone. Other churches had been given permission to build in the zone. Before purchase, the owner had been assured by the building inspector the property might be used for the purpose. On trial, counsel conceded the invalidity of the restriction in so far as the prior permits had been given to other churches. The exercise of the police power was held to extend to churches, but it was held that the public authority had not affirmatively established the necessity of the restriction to further the public health, safety or morals. Therefore, an injunction was issued. Unlike the present case, the determinations were made after trial. The burden of proof in Texas was placed on the city, rather than the protestant, as is the rule in California and in the U. S. Courts:

Acker v. Baldwin, 18 Cal. (2d) 341, 345, 346;
State v. *City of New Orleans*, 154 La. 271, 97 So. 440;
Dundee Realty Co. v. *Omaha*, 13 N. W. (2d) 634, 640;
Pacific States Box & Basket Co. v. *White*, 296 U. S. 176, 80 L. Ed. 138,

in which (as in *Euclid* v. *Ambler Realty Co.*, supra) it was held: When the legislative exercise of the police power is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of such facts (p. 185) and the one who assails it must carry the burden to show it is arbitrary. Allegations of the complaint which are conclusions of law are insufficient (p. 185).

The facts relied upon to rebut the presumption of constitutionality must be alleged.

In *Washington ex rel. Seattle Trust Co.* v. *Roberge*, supra this court held that where zoning or rezoning is made to depend upon the consent or nonconsent of adjacent property owners, which could be given or withheld at pleasure, there is denial of due process. *Roman Catholic Archbishop* v. *Baker* (Ore.) 15 P. (2d) 391, was a case in which the necessary number of signatures could not be obtained, consent to the construction of a parochial school on developed church property was therefore denied by the Council, and a lack of due process resulted. Where written permission of 75% of the adjacent owners was demanded, the Nevada Court in *Roman Catholic Archbishop* v. *Hill*, 90 P. (2d) 217, therefore held invalid the Reno ordinance; and in *Ellsworth* v. *Gercke*, 156 P. (2d) 242, the classification scheme of itself was held to be discriminatory; the trial court substituting its own findings for those of the city council, which as a matter of local law is contrary to the California rule:

Lockhard v. *Los Angeles*, 33 Cal. (2d) —, 33 Adv. Cal. 427, 202 P. (2d) 38, 43.

In the *Ellsworth* case, the church was petitioning to be admitted to the very use zone in which churches *are* permitted in the Porterville ordinance, together with schools, libraries, museums, art galleries, etc.

The case cited by all the above cases, and on which the *dicta* is based relative to the zoning of churches in general, is *State ex rel. Synod of Ohio* v. *Joseph*, 39 N. E. (2d) 515, 138 A. L. R. 1274, which however has been completely explained and limited, if not repudiated, by the Ohio court in *State ex rel. Hacharedi* v. *Baxter*, 74 N. E. (2d) 242, 244. In upholding a zoning ordinance prohibiting the use of property in a residential district for school purposes, the Ohio court clearly indicated that the prior opinion was based upon

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estoppel in pais, the city officers having induced the relator to purchase the property in question for the use later sought to be prohibited; and it further appeared that the determination to bar the zone to the petitioner was *administrative* rather than legislative.

(C) No substantial Federal question is involved in the contention that in limiting the erection of church buildings to a portion of the residential areas in Porterville there is an "unwarranted restriction of religious worship."

The quoted phrase does not reflect the legal considerations involved.

The First Amendment, stated frequently to have been carried into the Fourteenth by the "due Process clause" provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This relates to Congressional, not state, action.

The "free exercise of religion" therefore must be embraced, if at all, by Amendment XIV, section 1, which in part is, "nor shall any state deprive any person of life, liberty, or property without due process of law." It is not embraced under the "privileges and immunities" of citizens of the United States:

> Stone, J., in *Hague* v. *Comm. Ind. Org.,* 307 U. S. 496, 520-522;

and in fact, appellee corporation sole is not a "citizen" under the Fourteenth Amendment or under Title 28 U. S. C., Sec. 43:

> *Hague* v. *Comm. Ind. Organization,* 307 U. S. 496.

The denial of a building permit to appellant did not prohibit anyone worshipping, dictate his belief, censor it, or force external conduct incompatible with religious belief. We believe consideration of the history of the constitutional

freedom, so elaborately developed in *Everson* v. *Board of Education*, — U. S. —, 91 L. Ed. 472, 67 S. Ct. 504, discloses clearly that a nondiscriminatory ordinance, assigning church buildings to a zone with other buildings devoted to public assembly, is not a deprivation of "liberty" without due process of law.

As was said in the concurring opinion of Messrs. Justices Jackson, Black and Douglas, in *W. Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 87 L. Ed. 1628 at 1640:

> "No well ordered state can leave to the individual an absolute right to make final decisions, unassailable by the State, as to what they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressing imminent danger, or which, without any general prohibition, merely regulate time, place or manner of religious activity."

Mr. Justice Frankfurter, further on in the same case (87 L. Ed., p. 1646), states:

> "The individual conscience may profess what faith it chooses. It may affirm and promote that faith—in the language of the Constitution, it may 'exercise' it freely—but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way or by stealth."

Appellant in the trial court freely conceded that the police power of the State extended to the regulation of church structures; that a city might say *of what* and *how* they should be built, but not where (Rep. Tr. p. 75, lines 11-19). In drawing the line in rendering unto Caesar that which is Caesar's, and unto God that which is God's, this is an attenuated distinction.

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The suppression of the right of free speech has been held justified only to protect the public from grave, immediate dangers. Appellant seeks to apply this concept to the erection of a building; if it is a grave and immediate danger, it can be abated as a nuisance, or regulated *ex post facto*. As applied to buildings, this was the very argument which was asserted against the validity of all zoning. Zoning is prospective; for the orderly development of a community, taking care of the future as well as present needs, it must maintain orderly development in specified areas; and in so doing, to protect the future, to provide for the development of municipal facilities pertinent to the health, welfare and safety, will frequently prohibit in certain areas those uses which might not now be any "grave or immediate danger" —in other words, a demonstrable public nuisance.

The decisions of this court do not so shackle the police power. In its essence, this contention was met head on and rejected in *Euclid* v. *Ambler Realty Co., supra,* and *Zahn* v. *Board of Public Works, supra.*

A church as an institution, as a congregation, as a doctrinal concept, is untouched by the ordinance in question. A church *building* is still a building, subject to the hazards of nature and of man, no matter how sanctified by its devotion to a holy purpose. As a place of public assembly, it has the same characteristics as a lodge room, a community center (in fact, appellant proposes a "youth center" as part of its project), a school, a museum. The gathering of crowds, for the protection of people in numbers, calls for the presence of quite different fire, water, police and sanitary developments than where single family residences are involved. People in numbers create noise, increase safety problems in the movement, parking, and protection of motor vehicle traffic, require different street development and police than in single family residence zones. Noise is a necessary con-

comitant to the movement of large numbers of people, concentrated in attendance at a single building. The public safety is advanced, when places where people will concentrate are coordinated with fire protection and hospital facilities. The appellate court aptly observed that it would be strange if single family dwellings in R-1 could be protected from the influx of the two-family dwelling while the greater concentrations brought in by assemblages in public buildings, such as churches, could not be excluded.

We believe that the validity of the Porterville ordinance cannot be questioned, under the well-established principles approved heretofore by this Court and other Federal courts, and submit that the judgment should be affirmed.

Euclid v. *Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303;

Zahn v. *Board of Public Works*, 274 U. S. 325, 71 L. Ed. 1074;

Nectow v. *Cambridge*, 277 U. S. 183, 72 L. Ed. 842;

State v. *Houghton*, 273 U. S. 671, 71 L. Ed. 832, aff'g 204 N. W. 569;

DeLano v. *City of Tulsa*, 26 F. (2d) 640, cert. den. 278 U. S. 654, 73 L. Ed. 564;

Marblehead Land Co. v. *City of Los Angeles*, 47 F. (2d) 528, cert. den. 284 U. S. 634, 76 L. Ed. 540, 52 S. Ct. 18;

Koch v. *City of Toledo*, 37 F. (2d) 336.

The zoning ordinance operates on the *property* and not on the personal liberty or conscience of the corporate appellant, and the real property used for church purposes is not different than other property of similar use, such as that devoted to schools, lodges, museums, community centers and clubs. To maintain that because of its purpose, a church building should have preferential treatment over such other uses would in itself create an unwarranted and perhaps un-

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constitutional discrimination. If all were held entitled to be admitted, then the single family residence zone would in fact be destroyed. If the use to which the building is to be put is of paramount importance to the community, then the community is best fitted to determine its physical place. Appellant does not, and cannot, argue that any liberty of conscience or of worship for it has been denied. The argument is, that since the church is of such great, moral, social benefit to the community it is entitled to immunity from its civil restrictions and arrangements; and that if the city council doesn't concede the claim, it is a judicial matter. How far can any religious group claim immunity under one phase of the constitutional guaranty without running into the constitutional prohibition which is likewise part of it? Immunities may easily reach the stage that they in fact establish "religion" at the public expense. The same claim made by appellant would be made on exactly the same ground, constitutionally, as would one made by a society of atheists seeking to dispel belief in God and desiring to build a hall to conduct their efforts. Water is absolutely essential to life, but that does not give water production a preferred place in the residentail zone of a California city: *Sunny Slope Water Co.* v. *Pasadena*, 1 Cal. (2d) 87, 94. Food, likewise, is essential, but it needs no citation of authority to support the exclusion of such uses from the residential zones beyond *Eucild* v. *Ambler Realty Co., supra.*

> "It is not necessary, for the validity of the ordinance in question, that we should deem the ordinance justified by considerations of public health, safety, comfort or the general welfare. It is sufficient that the municipal council could reasonably have had such considerations in mind. If such considerations could have justified the ordinance, we must assume they did justify them.
>
> "If the municipal council deemed any of the reasons which have been suggested or any other substantial

reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of wisdom or good policy of municipal ordinances. If they are not satisfactory to the majority of the citizens, their recourse is to the ballot, not to the courts."

State v. *New Orleans*, 154 La. 271, 97 So. 440, and *Lockard* v. *Los Angeles*, 33 A. C. 427, 202 P. (2d) 38, 43;

Euclid v. *Ambler Realty Co.*, 272 U. S. 365, 388;

Zahn v. *Board of Public Works*, 274 U. S. 325, and opinion of California Supreme Court, 195 Cal. 477, 492 (affirmed).

Respectfully submitted this 2d day of July, 1949.

CITY OF PORTERVILLE AND
ITS OFFICERS DEFENDANT,
Defendants and Appellees.
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BLEED THROUGH—POOR COPY

INDEX

Table of Cases Cited

	Page
Board of Education v. *Barnette*, 319 U. S. 624	9
Bridges v. *California*, 314 U. S. 252	9, 12
Cantwell v. *Connecticut*, 310 U. S. 296	9
City of Sherman v. *Sims*, 183 S. W. (2d) 415	19
Craig v. *Horney*, 331 U. S. 367	12
DeJonge v. *Oregon*, 299 U. S. 353	9
Ellsworth v. *Gercke*, 156 Pac. (2d) 242	19
Euclid v. *Ambler Realty Company*, 272 U. S. 365	14, 17
Follett v. *McCormick*, 321 U. S. 573	9
Gitlow v. *New York*, 268 U. S. 652	9
Grosjean v. *American Press Co.*, 297 U. S. 233	9
Herndon v. *Lowry*, 301 U. S. 242	9
Jones v. *Opelika*, 316 U. S. 584	9
Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103	1
Lovell v. *Griffin*, 303 U. S. 444	9
Marsh v. *Alabama*, 326 U. S. 501	3, 9, 11, 12
Martin v. *Struthers*, 319 U. S. 141	9
Miller v. *Board of Public Works*, 195 Cal. 477	13
Millhein v. *Moffat Tunnel District*, 262 U. S. 710	1, 2
Murdock v. *Pennsylvania*, 319 U. S. 105	4, 9, 10
Nectow v. *City of Cambridge*, 277 U. S. 183	14, 19
Prince v. *Massachusetts*, 321 U. S. 158	9
Radice v. *New York*, 264 U. S. 292	19
Roman Catholic Archbishop v. *Baker*, 15 P. (2d) 391	19
Stromberg v. *California*, 283 U. S. 359	9
Sala v. *New York*, 334 U. S. 558	9
Schneider v. *State*, 308 U. S. 147	5, 9
State ex rel. Roman Catholic Bishop v. *Hill*, 90 Pac. (2d) 217	19
State ex rel. Synod of Ohio v. *Joseph*, 39 N. E. (2d) 515, 138 A.L.R. 1274	19
Terminiello v. *Chicago*, 337 U. S. 1	12
Thomas v. *Collins*, 323 U. S. 516	12
Washington ex rel. Seattle Title & Trust Co. v. *Roberge*, 278 U. S. 116	14
Whitney v. *California*, 274 U. S. 357	9
Zahn v. *Board of Public Works*, 274 U. S. 325	19

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 245

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A UTAH CORPORATION, SOLE,

Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, ET AL.

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Appellant respectfully petitions for a rehearing of the order of this Court made on October 10, 1949, dismissing appellant's appeal in the above-captioned case for want of a substantial federal question.

Time within which this petition for rehearing might be filed was extended (by order of October 22, 1949) until December 1, 1949.

Under the guidance of this Court's decision in *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 105, and *Millhein*

v. *Moffat Tunnel District*, 262 U. S. 710, 716, we may assume that this Court ruled that the federal question is not substantial because either:

(1) obviously without merit; or

(2) previous decisions of this Court so clearly show its unsoundness as to leave no room for controversy.

We respectfully submit that the Court erred respecting whichever of the above items was the basis for its order. We respectfully submit that this Court has somehow overlooked the very substantial nature and the seriousness of the question on appeal in this matter.

The question is one of the most grave and serious concern to petitioner and other religious denominations. If the right to build a church and worship in it can be denied or conditioned by a state under the federal Constitution, such novel exercise of the police power reasonably requires full inquiry by this Court. This case presents an assertion of right by a municipality to prohibit a church from using its own land for religious purposes—a most serious restriction of the freedom of religious worship. This petition for rehearing is submitted, therefore, so that your petitioner, as well as other parties who would be affected by this Court's order may (upon vacation of the order of dismissal and the notation of probable jurisdiction or postponement of the question of jurisdiction to the merits) submit briefs to the Court on the merits.[1]

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[1] Briefs on behalf of the Roman Catholic Archbishop of San Francisco, the Protestant Episcopal Church Bishop of California, and of the Bishop of the Protestant Episcopal Church of Los Angeles, California, were filed as *amici curiae* in support of a petition for hearing in the Supreme Court of the State of California.

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I

The Federal Question Is Not "Obviously Without Merit"

A. *The Decision of this Court in Effect Erroneously Permits Municipalities to Prohibit Religious Worship in Churches in Residential Sections of the City, Contrary to the Principles of this Court's Decisions in* Marsh *v.* Alabama *and* Murdock *v.* Pennsylvania.

Churches are the traditional and historic place for religious worship. The effect of the order of this Court is to permit municipalities to prohibit traditional religious worship in the residential sections of municipalities—the building of a church and meeting in it for worship. This result is reached in spite of previous decisions of this Court in which it has indicated in no uncertain terms that other forms of religious worship—evangelical preaching or distribution of religious tracts or literature—cannot be prohibited in *any* part of a city. We refer to the following decisions of this Court, which diligently protect the constitutional guaranty of freedom of religious worship in the form of evangelical preaching against municipal ordinances which would prohibit or stultify such guaranty. Thus, *Marsh* v. *Alabama,* 326 U. S. 501, 504-505:

> "Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear that appellant's conviction must be reversed. Under our decision in Lovell *v.* Griffin, 303 U. S. 444, and others which have followed that case [citations of many cases in footnote omitted], neither a State nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalk and public places or make the right to distribute

> dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the municipality holds legal title to them. Jamison *v.* Texas, 318 U. S. 413. And we have recognized that the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a municipality could not, without jeopardizing that vital individual freedom, prohibit door to door distribution of literature. Martin *v.* Struthers, 319 U. S. 141, 146, 147. * * *"

See also *Murdock* v. *Pennsylvania,* 319 U. S. 105, 110, *et passim.*

If evangelical preaching and the distribution of religious tracts and literature may not be prohibited in the residential districts of the City of Porterville by reason of the constitutional guaranties of the protection of religious worship, how then can the more conventional form of religious worship in a church be barred from such districts?

This Court has not indicated that door-to-door evangelical preaching is entitled to a higher degree of protection than that accorded the more conventional forms of religious worship in churches. To the contrary, it has indicated that all forms of religious worship are entitled to the same protection. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108-109:

> "The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. [Footnote citations omitted.] It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. [Footnote citations omitted.] It is more than preaching; it is

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more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. . . ."

An ordinance that would prohibit building and using a church within the city limits of Porterville, we submit, would be clearly unconstitutional as violative of the constitutional protection. It would be a striking down of the form of worship most favored by our culture and what is regarded by substantially all of the people as the conventional instrument of religious worship. The challenged ordinance accomplishes just that for a substantial part of the city. The ordinance under attack prohibits churches in any except the least desirable residential districts and relegates churches to less-favored locations with such semi-commercial uses as automobile stage stations, telephone exchanges, private clubs, police stations, etc. The difference between complete prohibition and the small concession here allowed differs, as this Court has ruled, "only in degree". *Murdock* v. *Pennsylvania, supra,* at p. 117:

> "The ordinance is not narrowly drawn to prevent or control abuses or evils arising from that activity. Rather, it sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid. That restraint and one which is city-wide in scope (*Jones* v. *Opelika*) are different only in degree. Each is an abridgement of freedom of press and a restraint on the free exercise of religion. They stand or fall together."

And see *Schneider* v. *State,* 308 U. S. 147, 163:

> "It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited

to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

B. *The Ordinance On Its Face Restricts the Freedom of Religious Worship, Which Freedom Is Accorded a Higher Degree of Protection Than Is Accorded the Protection of Property Rights Under the Fourteenth Amendment.*

Respondents in their motion to dismiss, in an obvious attempt to evade the constitutional issue, suggest that the complaint does not sufficiently raise the constitutional question. It is claimed that the constitutional provisions relied upon were conclusions of law. It is, of course, sufficient that this Court in its order took no account of such a ground. Every fact necessary to raise the constitutional question was alleged. The constitutional provisions relied upon were recited in the complaint for the purpose of bringing to the attention of the Court the constitutional challenge.

Briefly, the petition presents the following facts:

In Paragraph I, the appellant is identified as a corporation sole, organized under the laws of Utah, qualified to do business in California, and to construct and maintain a church for religious worship in Tulare County, California.

In Paragraph II, defendant City of Porterville is identified as a municipal corporation, and defendants Ross Gardner and Harold Coulthurst, as building inspector and city manager, respectively, of the City of Porterville. It is alleged that since October 26, 1947, defendant Gardner has been building inspector and prior to that, one Robert Thomas was building inspector.

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In Paragraph III it is shown that appellant has been since March 19, 1945, the owner of certain described real estate in Tulare County, which real estate was on or about October 23, 1945, taken into the corporate limtis of the City of Porterville.[1]

In Paragraph IV, appellant showed that it duly filed with the defendant city, the city manager, and the building inspector an application to erect a church for religious worship upon its property, and that accompanying said application were plans and specifications and the required fee, in all respects conforming to the requirements of the defendant city's Building Code. It is alleged that although appellant did not specifically mention and request issuance of a certificate for use and occupancy, such request was made and implied in the application; and that a request for such issuance would have been futile and useless in that defendants would have refused to issue such a certificate even if the application had specifically mentioned a request for the issuance of a certificate, since defendants conceived it was mandatory upon them not to issue a permit for the construction, use and occupancy sought, and so advised the appellant; that appellant did all required as prerequisites to the issuance of a permit to erect a church.

In Paragraph V, it is shown that the defendant building inspector refused to issue a permit for the erection of a church and still refuses to do so, and returned to the appellant the plans and specifications.

In Paragraph VI, it is shown that the reason given by the defendants for refusing to issue the permit was that the property was zoned solely for the erection of single family dwellings. A copy of the City of Porterville Ordinance No. 383, the applicable zoning ordinance, is attached to the peti-

[1] It was stipulated at the hearing that part of the property was inside and part was outside the city limits at the time acquired by appellant (Rep. Tr. p. 816-20).

tion. Also, by stipulation at the hearing, there was attached to the petition a copy of the zoning map (Rep. Tr. p. 84).

The copy of the zoning map disclosed the exact areas affected by the ordinance and it appears from said map that a person residing on the western boundary of Zone 1 would be required to travel over half the width of the City of Porterville to reach a zone in which a church can exist under the terms of the ordinance.

Thus, there was alleged not only the ownership of the property and the pleading of the ordinance, but also that the property was zoned in an area where churches were restricted, that petitioner was the owner of the property and had applied for permission to build a church and that the petition was denied upon the ground that it was prohibited by the ordinance under attack. There was thus presented and pleaded and admitted by the demurrer the prevention of petitioner building a church on its property by reason of the ordinance.

The provisions of the ordinance as applied, absolutely prohibiting the erection of churches for religious worship in the preferred residential sections, was thus challenged.

Let us view this restriction in the light of general common knowledge.

The church is the traditional house of worship for Christians. It is the recognized instrument for the more conventional preaching of religion. It has been indicated by decisions of this Court that an evangelical preacher would have the right to preach or distribute religious tracts in any part of the City of Porterville. It would seem to follow then that the prohibition of a church, the conventional place and instrument of religious worship, is a direct and substantial restriction of the freedom of religious worship.

In considering whether there is presented a substantial federal question, there must not be overlooked the basic

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and fundamental distinction between the question of due process as applied to the protection of commercial enterprises and the question of due process as applied to the protection of the fundamental right of religious freedom or free speech. This Court heretofore always has accorded a far higher degree of protection to the fundamental rights, such as religious freedom, as compared with property rights. These fundamental rights which are guaranteed by the First Amendment (which by its terms imposes restrictions upon the power of Congress) are part of the liberty protected by the Fourteenth Amendment against deprivation by the states. This proposition has been established for the past 25 years.

Gitlow v. *New York*, 268 U. S. 652 (1925);
Whitney v. *California*, 274 U. S. 357 (1927);
Stromberg v. *California*, 283 U. S. 359 (1931);
Grosjean v. *American Press Co.*, 297 U. S. 233 (1936);
DeJonge v. *Oregon*, 299 U. S. 353 (1937);
Herndon v. *Lowry*, 301 U. S. 242 (1937);
Lovell v. *Griffin*, 303 U. S. 444 (1938);
Schneider v. *State*, 308 U. S. 147 (1939);
Cantwell v. *Connecticut*, 310 U. S. 296 (1940);
Bridges v. *California*, 314 U. S. 252 (1941);
Jones v. *Opelika*, 316 U. S. 584 (1942);
Murdock v. *Pennsylvania*, 319 U. S. 105 (1943);
Martin v. *Struthers*, 319 U. S. 141 (1943);
Board of Education v. *Barnette*, 319 U. S. 624 (1943);
Follett v. *McCormick*, 321 U. S. 573 (1944);
Prince v. *Massachusetts*, 321 U. S. 158 (1944);
Marsh v. *Alabama*, 326 U. S. 501 (1946);
Sala v. *New York*, 334 U. S. 558 (1948).

And showing that these fundamental rights are accorded a far higher degree of protection than the rights of the

marketplace, see *Board of Education* v. *Barnette*, 319 U. S. 624, 639:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibition of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restrictions only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

And holding that the right of religious freedom is above and distinct from the right to engage in business as a retailer of goods, see *Murdock* v. *Pennsylvania*, 319 U. S. 105, 110-111, and in addition the following language:

> ". . . This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press. . . . [p. 109]
> "The fact that the ordinance is 'nondiscriminatory'

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is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position." (p. 115).

And as stated in *Marsh* v. *Alabama*, 326 U. S. 501, 509:

> "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." (Citing *Jones* v. *Opelika; Murdock* v. *Pennsylvania* and *Follett* v. *McCormick*, supra.)

C. *The Challenged Ordinance Prima Facie Presents a Substantial Question of Violation of Section 1 of the Fourteenth Amendment. The Ordinance Does Not Meet the Test of Constitutionality Which the Law Imposes, Namely, That It Be Necessary to Prevent a Clear and Present Danger of Serious Substantive Evil That Arises Far Above Public Inconvenience, Annoyance or Unrest.*

The rule that municipal ordinances merely expressing the police power of the state will be presumed valid does not apply when the subject matter of the ordinance deals with one of the fundamental freedoms guaranteed by the First and Fourteenth Amendments. Indeed, not only does this presumption not apply, but when the ordinance imposes restrictions upon a fundamental liberty guaranteed by the First and Fourteenth Amendments, as hereinabove mentioned, a contrary presumption arises and the ordinance will be sustained when and only when there is a showing of absolute necessity to protect the public against a "clear

and present danger of a serious substantive evil that rises far above public inconvenience, annoyance and unrest". Only such a necessity will justify a restriction upon one of the fundamental freedoms. The quotation just made is taken from *Terminiello* v. *Chicago*, 337 U. S. 1, 4, based upon opinions of this Court in *Bridges* v. *California*, 314 U. S. 252, 262, and *Craig* v. *Horney*, 331 U. S. 367, 376. The proposition has been announced and repeated by numerous decisions by this Court. *Thomas* v. *Collins*, 323 U. S. 516, 530:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, *cf. De Jonge* v. *Oregon*, 299 U. S. 353, 364, and therefore are united in the First Article's assurance. *Cf.* 1 Annals of Congress 759-760."

And in *Marsh* v. *Alabama*, 326 U. S. 501, 509:

> "When we balance the Constitutional rights of owners of property against those of the people to

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> enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights.'"

Is the presence of a church in a residential section inimical to the public good, presenting evil rising far above inconvenience, annoyance or unrest? We believe that religious worship in residential areas of the city, rather than being an evil to be prohibited, is something good and a blessing to be nurtured. We believe that religious worship is intimately connected with the home life of all the people and should be considered as an adjunct of the home and of the family. The relationship between the church and home was recognized by the Supreme Court of the State of California in *Miller* v. *Board of Public Works,* 195 Cal. 477,

> "With ownership comes stability, the welding together of family ties and better attention to the rearing of children. With ownership comes increased interest in the promotion of public agencies, such as church and school, which have for their purpose a desired development of the moral and mental make-up of the citizenry of the country."

We attest our faith that in any view the federal guaranty forbids the state to class church building for religious worship with those limited cases which constitute "a clear and present danger of a serious substantive evil."

D. *The Zoning Ordinance Is Invalid Because It Has No Substantial Relation to the Public Health, Safety, Morals or General Welfare.*

If a religious organization is to be denied the right to build a church on its own property, the power to forbid such use of its property should be found somewhere. But the power of a municipality to enact zoning statutes finds its basis only in the police power of the state, and its authority stems only from the state's power to enact such measures as have a reasonable tendency to promote public health, safety, morals and general welfare.

Washington ex rel. Seattle Title & Trust Co. v. *Roberge*, 278 U. S. 116, 120;
Nectow v. *City of Cambridge*, 277 U. S. 183;
Cf. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395.

Does the elimination of churches from the most desirable and preferred residential districts of a city, and their relegation to the least desirable district, along with hotels, private lodge halls, private clubs, automobile stage stations, telephone exchanges, etc., serve any interest of public health? of public safety? of public morals? or of the general welfare? If it does not, then the ordinance is invalid because not a legitimate exercise of the state's police powers.

May we respectfully ask this Court wherein the assertion of the freedom of religion herein is frivolous or without merit? And where in any previous decision of the Court it is ruled that the exclusion of a church from residential sections of a city does tend to promote the public health? The public safety? The public morals? The general welfare? Is a church to be likened to commercial enterprises within the distinction which, as this Court quoted in the *Euclid* case (272 U. S. at p. 393):

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> ". . . furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregation need police protection. . . . Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. . . ."

If a church harbors mice, an old adage teaches us the church mouse is a "poor one", and not so substantive a threat to the public health or safety as to furnish the basis for denying the right to build a church on property owned by the church for religious purposes.

Appellant submits that far from serving the interests of public health, safety, morals or general welfare, the ordinance has the opposite effect and tends to defeat the general welfare, the very basis upon which such a zoning ordinance as is here involved, rests.

The basic philosophy behind the police power of a state to enact zoning ordinances appears to be briefly this: Justification for residential zoning in the last analysis rests upon the protection of the civic and social welfare values of the American home. Thus, separation of residential districts from commercial enterprises and establishment of single-dwelling, more desirable home residential districts, have this common fundamental purpose, to-wit, the protection of the home. But a restriction relegating churches to the least desirable districts of a city does not serve any purpose in the protection of the home. It has the opposite effect; for the church fosters the very thing that residential zoning seeks to protect, the social and moral values of the American home. The proper place for churches, therefore, is in home communities. The exclusion of churches from home districts and their

relegation to districts in which are tolerated public and semi-commercial institutions (R-4 Porterville zoning statute) is not based upon any purpose of protecting the home, but "to make exclusive districts more exclusive." (Bassett on Zoning, p. 72.)

The California court purported to see dangers to the public health, particularly to that of the youth of the community, in the more emotional type of religious worship prevailing in certain sects. If that danger be real, it would have greater application only in the more congested and less desirable districts where children are found in greater numbers and with less opportunity. But can a basis for discrimination between the residents in the least desirable district ~~to such fancied dangers~~ on the one hand, and residents of the more restricted districts be found which would deny the right to build a church in what otherwise would be contradiction of the federal guaranty?

And, further, if the lower court was correct in its supposition that religious worship in churches might endanger public health and welfare, then it might well be within the power of a legislature to abolish churches altogether. This, we submit, is foreign to human experience, and is utterly repugnant to the fundamental principles of law upon which our civilization is based. Those principles are so vital and so sacred that they are written into the Constitutions of both state and nation.

It is axiomatic and needs no citation of authorities that the phrase, "freedom of religious worship" means exactly what the words say; and individual worship need not conform to the pattern of what may be sober and enlightened religious thinking. If such speculation as was indulged in by the California court, totally unsupported by any factual background, could be a basis for the restriction of religious worship, there would be, indeed, little protection and comfort in the constitutional guarantees of freedom

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of religious worship, freedom of speech, and the other liberties of our Constitutions.

II

The Questions Involved Are Not Clearly Foreclosed by Earlier Decisions of This Court

A. *The Question Is One of First Impression Before This Court. State Courts Passing Upon Substantially the Same Question Have in All Instances, Save the Case at Bar, Held Against the Validity of Ordinances Having the Effect of Prohibiting Churches in Residential Sections of a City.*

So far as petitioner has been able to find, this Court has never decided the question whether a municipal zoning ordinance may validly prohibit churches in residential districts. Neither has appellee or the court below cited such a case. In a case where this point was involved in an ordinance under review, this Court expressly refrained from ruling on the question as not in issue, and it was thus indicated that the Court saw substance in the question.

The case referred to (which is one relied upon by appellees) is that of *Euclid* v. *Ambler Realty Company*, 272 U. S. 365. In it the Court had under consideration a zoning ordinance similar to the ordinance here involved. The ordinance was challenged as being in derogation of Section 1 of the Fourteenth Amendment. The party challenging the ordinance was the owner of a tract of land containing 68 acres. It was not alleged that there was a demand for any part of appellee's lands for churches. It also appeared that none of appellee's land fell within the class (U-1) restricted to single family dwellings and other enumerated uses. On this point the Court ruled (p. 385):

> "The record goes no farther than to show, as the lower court found, that the normal, and reasonably to

from the presence in the ordinance of those restrictio

be expected, use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal and reasonably to be expected, use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect to these and similar uses; to which perhaps should be added—if not included in the foregoing—restrictions in respect of apartment houses. *Specifically, there is nothing in the record to suggest that any damage results relating to churches,* schools, libraries and other public and semi-public buildings. *It is neither alleged nor proved that there is or may be a demand for any part of appellee's land for any of the last named uses;* and we cannot assume the existence of facts which would justify an injunction upon this record in respect of this class of restrictions. *For present purposes the provisions of the ordinance in respect of these uses may, therefore, be put aside as unnecessary to be considered.* It is also unnecessary to consider the effect of the restrictions in respect of U-1 [restrictions to single family dwellings, etc.] districts, since none of appellees' land falls within that class." (Emphasis supplied.)

(As pointed out above, in the case at bar it is alleged that plaintiff was the owner of land in the area specifically limited to single family dwellings and where churches were specifically excluded. A map of the entire city of Porterville was made a part of the complaint so that the exact relation of petitioner's land in the zoning scheme was before the Court. It was also alleged that plaintiff desired to construct a building for religious worship upon the premises and was denied a permit for the sole reason that the challenged ordinance prohibited the construction of churches

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on the property owned by the appellant. The allegations of the complaint were unchallenged and the demurrer to the complaint was sustained without leave to amend upon the specific ruling that the ordinance did not violate constitutional guaranties.)

The other decisions of this Court cited by the appellees in support of their argument of no substantial federal question do not deal with the question here presented. The case of *Zahn* v. *Board of Public Works*, 274 U. S. 325, involved denial of a permit to erect a business building in a district restricted to residential purposes. The case of *Radice* v. *New York*, 264 U. S. 292, involved a statute with respect to the employment of women in restaurants between the hours of 10:00 o'clock at night and 6:00 o'clock in the morning. The case of *Nectow* v. *Cambridge*, 277 U. S. 183, had to do with zoning bordering on railroad tracts as residential and in that case the Court held that the owner *was* unconstitutionally deprived of the use of his property.

The courts of last resort in the States of Texas, Arizona, Oregon, Nevada and Ohio have held against the validity of zoning ordinances where the ordinance results either directly or indirectly in the prohibition of churches in residential districts. The cases referred to are as follows:

City of Sherman v. *Sims* (Texas), 183 S. W. (2) 415, aff'g, 181 S. W. (2) 100;

Ellsworth v. *Gercke* (Ariz.), 156 Pac. (2) 242;

Roman Catholic Archbishop v. *Baker* (Ore.), 15 P. (2) 391;

State ex rel. Roman Catholic Bishop v. *Hill* (Nev.), 90 Pac. (2) 217;

State ex rel. Synod of Ohio v. *Joseph* (Ohio), 39 N. E. (2) 515, 138 A. L. R. 1274.

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We may refer particularly to the *State ex rel. Synod of Ohio* v. *Joseph*, 139 Ohio State, 229, 39 N. E. (2) 515. Said the court (39 N. E. (2) 520, Col. 2):

> "We seriously question the constitutionality of any enactment that seeks flagrantly to prohibit the erection of churches in residential districts."

In a note appended to the report of the foregoing case, which appears in 138 A. L. R. 1287, there is stated a summation of what we submit is generally regarded to be the law upon this subject and which appears to present the view, which the Supreme Court has apparently declared to be without substance. The note states:

> "In the relatively few cases in which the question has been considered, the view has consistently been taken that an administrative application of a zoning ordinance which operates to exclude the erection of church buildings in residence districts is invalid, either as violative of the due process and equal protection clauses of the state and Federal Constitutions, or as being an arbitrary and unreasonable enforcement of the ordinance."

Conclusion

We respectfully submit that the question presented on the appeal herein is a substantial federal question and is not so unsupported by law or reason as to be beyond the jurisdiction of the Supreme Court of the United States.

Wherefore petitioner respectfully petitions that its petition for rehearing be granted and that the order dismissing the appeal be vacated and set aside, and that probable jurisdiction be noted.

W. Glenn Harmon,
Johnson, Harmon, Stirrat & Henderson,
Counsel for Appellant.

John W. Cragun,
Of Counsel.

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Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 245

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, A UTAH CORPORATION, SOLE,

Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, ET AL.,

Appellee

ANSWER TO PETITION FOR REHEARING

LEON THOMAS DAVID,
Counsel for Appellees.

WALDO E. BURFORD,
WM. MACKENZIE BROWN,
Of Counsel.

INDEX

Table of Cases Cited

	Page
American Baseball Club v. *Philadelphia*, 312 Pa. 311, 167 Atl. 891, 92 A.L.R. 386	6
Cantwell v. *Connecticut*, 310 U. S. 296	12
Chaplinsky v. *New Hampshire*, 315 U. S. 568	4
De Lano v. *City of Tulsa*, 26 F. (2d) 640, 278 U. S. 654, 73 L. Ed. 564	8
Euclid v. *Ambler Realty Co.*, 264 U. S. 292	11
Everson v. *Board of Education*, 330 U. S. 1	4, 5, 6
Flaherty, In re, 105 Cal. 558	10
Gaylord v. *City of Pasadena*, 175 Cal. 433	10
Hague v. *Comm. Ind. Org.*, 307 U. S. 496	
Jones v. *Opelika*, 316 U. S. 584	12
Kovacs v. *Cooper*, 336 U. S. 77, 93 L. Ed. 379	4, 9, 12
Leventhal v. *District of Columbia*, 100 F. (2d) 94, 69 App. D. C. 229	11
Levering & Guarrigues Co. v. *Morrin*, 289 U. S. 103	3
Marsh v. *Alabama*, 326 U. S. 501	4, 5
Martin v. *Stothers*, 319 U. S. 141	12
McCollum v. *Board of Education*, 333 U. S. 203	5, 6
Meyer v. *Nebraska*, 262 U. S. 390	9
Millheim v. *Moffet Tunnel District*, 262 U. S. 710	3
Murdoch v. *Pennsylvania*, 319 U. S. 105	5, 7, 12
Pacific States Box & Basket Co. v. *White*, 296 U. S. 176	11
Pierce v. *Society of Sisters*, 268 U. S. 570	9
Prince v. *Massachusetts*, 321 U. S. 158	4, 12
Reynolds v. *United States*, 98 U. S. 145	12
Rode v. *Siebe*, 119 Cal. 518	11
Saia v. *New York*, 334 U. S. 558	4, 12
Schneider v. *Irvington*, 308 U. S. 161	2
Summers, In re, 325 U. S. 561	4
West Virginia State Board of Education v. *Barnette*, 319 U. S. 624	9

Page
Whitney v. *California*, 274 U. S. 357 ..... 11, 12
Wilkins v. *San Bernardino*, 29 Cal. (2d) 332 11

STATUTES CITED

California Constitution:
Art. XIII, Sec. 1½, Sec. 1½a 6
Art. XIX, Sec. 3 6
California Government Code, Sec. 1360 10
Federal Constitution, Amendments I and XIV 3

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

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CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, A UTAH CORPORATION, SOLE,

Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, ET AL.,

Appellee

ANSWER TO PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On October 10, 1949, this Honorable Court made the following order:

> "PER CURIAM: The motion to dismiss is granted and the appeal is dismissed for want of a substantial Federal question"
> (94 L. ed. Adv. Op. p. 34).

It is respectfully submitted that the Petition for Rehearing and vacation of this order should be denied.

Substantially, the *Petition for Rehearing* duplicates the arguments of the *Statement As to Jurisdiction* previously filed by appellant. It does not purport to answer, nor in the main, to controvert, the points and authorities of appellees, submitted in the *Statement Opposing Jurisdiction* and *Motion to Dismiss or Affirm.*

On pages 12-16 of the *Statement Opposing Jurisdiction,* etc. an adequate answer was made to the claim that the nondiscriminatory zoning ordinance in question was "an unwarranted restriction on religious worship." The authorities there cited, and the considerations there advanced, were never answered by appellant at the time, and are not answered in the *Petition for Rehearing* now. How a corporation—even a corporation sole—can claim that its *personal* rights of freedom of worship could be involved is not apparent. In what way is the corporation sole a citizen whose privileges and immunities are violated?

cf. Stone J. in Hague v. Comm. Ind. Org. 307 U. S. 496, 520-522.

Neither the Porterville congregation nor any member thereof was ever a party to this law suit, involving the temporal relationships touching land use and ownership.

The existence of the zoning ordinance, (in fact, its preexistence in relation to appellant's land ownership) did not "prohibit anyone worshipping, dictate his belief, censor it, tax it, or force external conduct incompatible with religious belief" (*Statement Opposing Jurisdiction* etc. p. 11-12)

Jones v. Opelika, 316 U. S. 584, 593-4, 595-6.

This Court, in granting the motion to dismiss, did "appraise the substantiality of the reasons advanced in support of the regulation" as indicated in Schneider v. Irvington, 308 U. S. 161, which reasons were succinctly advanced in the *Statement Opposing Jurisdiction* etc. p. 12-16.

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No federal question is presented, because the non-discriminatory zoning ordinance in question did not violate the I or XIV Amendments to the Federal constitution; and because the previous decisions of this Court foreclose the subject and "leave no room for the inference that the questions sought to be raised can be the subject of controversy" under the Federal constitution. The conditions summarized in Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 105 and Millhein v. Moffet Tunnel District, 262 U. S. 710, 716, cited by petitioner, have been acted upon by this Court. The issues arise upon the pleadings, the challenge was as to constitutional power, and at this point there are no "merits" to be considered other than those presented in the legal challenge.

It is claimed that the "free exercise of religion" requires that the public authorities permit the construction of a church building anywhere within a city; the "preferred position" of the freedom of conscience requires that such buildings be exempted from the non-discriminatory ordinance provisions for the public safety, welfare and convenience, whereby zones are designated within which schools, lodges, club buildings, public buildings, public museums, etc. shall be permitted, and other zones are designated within which they are not.[1]

The logical extention of the contentions of appellant would be, that restrictions prohibiting erection of wooden buildings in fire limits, providing for doors opening out, adequate ventilation, and fire escapes, are all impairments of the "freedom of religion" because they necessarily im-

---

[1] As pointed out in the respondent's *Statement Opposing Jurisdiction* and *Motion to Dismiss* (pp. 11-16), the basis for such classification rests in the definite need to regulate in the interests of public safety, welfare and convenience *all* uses which involve the assembly of persons in numbers; which impose special problems of fire and police protection, accommodation of traffic, and noise, in the midst of a residential section.

pose burdens on those who desire to establish a "church and youth center."

> "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquillity of a community."
>
> Kovacs v. Cooper, 336 U. S. 77, 93 L. ed. Adv. at 384.

This power was recognized (in converse to the present situation) in *Everson* v. *Bd. of Education*, 330 U. S. 1. The safety of school children could be protected by providing school busses at public expense, even though the destination of the children might be a religious, rather than public, institution, there being an incidental aid to religion, though aid per se is constitutionally prohibited. The safety of members of a church congregation, as individual citizens, may be protected; and the reciprocal safety, welfare and convenience of others can be protected against those who might infringe such rights. A may not excuse himself for walking over B's flowerbeds because he was on the way to church.

Petitioners contend that since this court struck down municipal ordinances which permitted restriction of distribution of religious literature on public streets *cf. Marsh* v. *Alabama*, 326 U. S. 501 or regulation of the use of a loud speaker in a public park *Saia* v. *New York*, 334 U. S. 558 (but compare *Kovacs* v. *Cooper*, 336 U. S. 77), on the ground that such conduct constituted an exercise of free speech and freedom of religion, *a fortiori* a city cannot regulate location of church buildings for public safety and welfare.

That this result does not follow inescapably is indicated by

Prince v. *Massachusetts*, 321 U. S. 158;
Kovacs v. *Cooper*, 336 U. S. 77;
In re Summers, 325 U. S. 561;
Chaplinsky v. *New Hampshire*, 315 U. S. 568.

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The action of this Court on October 10, 1949, does not contravene the doctrine or language of *Marsh* v. *Alabama*, 326 U. S. 501, 504-5 (cited in *Petition for Rehearing*, p. 3) as the ordinance in question does not "completely bar" churches nor does it prohibit or stultify freedom of religious worship. It does not by a license tax, seek to exact tribute as a condition precedent to the exercise of religion, nor to permit censorship by denial of a license, which liberty constitutionally is not subject to such a condition precedent. (*Murdoch* v. *Pennsylvania*, 319 U. S. 105, 108-9, Petition p. 45)

To permit disregard of the municipal police regulations in construction of buildings for worship, while enforcing such restrictions as to buildings for public schools, lodges (many of high ethical or religious motivation) and buildings for quasi-public uses, or made use of by members of the public in large numbers, would itself be public preferment and aid of religious organizations determined invalid in *Everson* v. *Board of Education*, 330 U. S. 1, 18 and *McCollum* v. *Board of Education*, 333 U. S. 203.

If a city is forced to admit such buildings and uses in first residential areas, where police, fire, or sanitary facilities, street paving and parking, etc. are adequate for such residential service; but are not, for protection and regulation of gatherings of large groups of people, what is the duty? To adequately protect and regulate the incidents of such gatherings requires in many instances more extensive paving and sidewalks, more police details and vehicles, larger water and sewer mains, additional water pressures. In a small community, dispersal of such facilities over a wide area either lengthens running time for fire, police and ambulance services from central locations (and consequent decreased effectiveness for public safety) or requires erection of new and costly facilities, and employment of more personnel. From the tax burdens incident to the provision

of such additional requirements, churches and eleemosynary institutions in California are constitutionally exempt.

Cal. Const. Art. XIII Sec. 1½ Sec. 1½a.

If the individual church or other such body were to undertake to meet such costs, it would be a tremendous burden. If there were a municipal regulation which would require them to meet such extra costs, as a condition precedent to such operation, could there still be the claim that "freedom of religion" would not constitutionally permit such charge?

(*cf. American Baseball Club* v. *Philadelphia*, 312 Pa. 311, 167 Atl. 891, 92 A. L.R. 386, which this Court refused to review.)

If such special burdens were to be assumed by the public, would there not be an unconstitutional public expenditure to aid religious purposes, prohibited by the California Constitution, Art. XIX, Sec. 3; and likewise prohibited under the XIV and I amendments?

Cf. Everson v. *Board of Education*, 330 U. S. 1, 15, 23, 26; *McCollum* v. *Board of Education*, 333 U. S. 203, 210-212.

Petitioner's approach to this problem (*Petition for Hearing*, p. 14-15) is to assert that any police regulation of location of church buildings and activities, can only be justified on the ground that a church is a bad thing for a community.

We must not overlook the impact of the location of any place of public assembly, for whatever purpose, upon a residential neighborhood. Bodies of people, coming and going, involve certain detriments, such as noise, dust; and traffic, with fumes, flashing of lights, and peaks of congestion. Sanctity of the purpose of assembly does not reduce these tangible factors. The concomitants of appellant's proposed "youth center" could not be expected to be any different than school yards. Other pertinent factors as to the quiet, repose, and tranquillity of a strictly residential

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area are self-evident. All of these factors, we submit, are relevant to municipal action in working out a reasonable accommodation between the competing requirements of a compact modern community.

The people of the community of Porterville, as in thousands of other American communities, have partially solved the problem by zoning. The places of public assembly, including churches, have been permitted in a large area (of a small city) convenient to the facilities present which are required for protection of public safety and welfare. Likewise, those to whom the incidents of such uses are discommoding, can find two small residential areas in which they are freed from the physical impact of large assemblies of people, while remaining within distance, so that they can benefit from schools, lodge and club halls, churches, museums and like uses. The zoning scheme is "narrowly drawn to *prevent* or control abuses or evils" arising from all such activity.

(Cf. *Murdoch* v. *Pennsylvania*, 319 U. S. 105 at 117.)

Petitioner claims that the residential areas are "exclusive" and complains because it may not share in such exclusiveness; that these areas are the most "desirable" areas, and that church buildings are relegated to "less favored" residential areas. (*Petition for Rehearing*, p. 5.)

What makes the R1 and R2 zones "more desirable?"

Only the exclusion therefrom of buildings involving concentration of people—this fact, and the other residential uses permitted, constitute the only difference. The petitioner would contend that it was entitled to preference in location over schools and other public buildings.

Churches—as organizations—are not only desirable, but essential to the public welfare. The question raised here, however, is not as to the exclusion or inclusion of churches

in the community. The statement (*Petition for Rehearing*, p. 5) that there is here involved "a striking down of the *form* of worship most favored by our culture" is preposterous. Churches are permitted in residential (R3-4) zones and all other zones but R1 and R2. (For indication of uses permitted, see *Statement Opposing Jurisdiction* etc., p. 2; Clerk's Tr., p. 20 Exhibit 1).

How does the zoning requirement, as asserted by appellant (*Petition for Hearing*, p. 15) "tend to defeat the general welfare"? In the confines of the small City of Porterville, the location of any building in one area, as contrasted to another, restricts it only to the degree it is conveniently located as to any given person. A site which favors the convenience of one in the north is conversely that much less convenient to one in the south, and as to those who come from a distance in any direction, the same truth applies.

(See Zoning Map, Clerk's Tr., p. 20.)

The municipality does not bar churches from its limits nor does it threaten to. Their civic, social and moral values are not lost to Porterville by its zoning of church buildings. There are as many church buildings and church congregations with zoning, as without it. All other churches are located consistently with the zoning requirements. Land was available in Porterville for appellant's church building in the permitted areas but appellant deliberately purchased property for a church site with full knowledge that the district in which the site was located was zoned against church and youth center uses. For this reason alone, in addition to others presented in the *Statement Opposing Jurisdiction*, the zoning requirement was not wanting in any "due process" to appellant corporation.

De Lano v. *City of Tulsa*, 26 F. (2d) 640, 645 cert. den. 278 U. S. 654, 73 L. Ed. 564.

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In brief: the petitioner, as land owner, is not emancipated from the common requirements of the State, applicable to all land owners in similar circumstances.

Meyer v. *Nebraska,* 262 U. S. 390.

Pierce v. *Society of Sisters,* 268 U. S. 570.

The Ordinance Is Not Presumptively Invalid

Petitioner argues (*Petition for Rehearing,* p. 11) that the ordinance is presumed invalid, if in operation it collides with or affects the constitutional right of free speech or freedom of religion. Our study leads us to conclude with Mr. Justice Frankfurter:

> "In short, the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment and the Fourteenth Amendment, insofar as the latter's concept of 'liberty' contains what is specifically protected by the First, has never commended itself to a majority of this Court."
>
> *Kovacs* v. *Cooper,* 336 U. S. 77, 94-5, 93 L. Ed. Adv. Op. 379, 390.

The "clear and present danger rule" does not apply. We are not here concerned with any "censorship or suppression of expression of opinion" or of religious belief or practice. (Cf. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 631-633.) "No official, high or petty" is prescribing "what shall be orthodox in • • • religion" or forcing "citizens to confess by word or act their faith therein" (idem., p. 642).

The freedom asserted by the appellant *does* bring it into collision with rights asserted by other individuals (Cf. idem., p. 630). This matter is *not* one of "self-determination in matters which touch individual opinion and personal attitude" (Cf. idem., p. 631).

In this situation, what interests are minor and which are major in relation to zoning belongs to the Council, the

constituted agency of the State of California, to decide (Cf. idem., p. 649-654).

The councilmen and officials of the City of Porterville are sworn to uphold and defend the Constitution of the United States, no less than the Honorable Justices of this Court. Cal. Government Code, Sec. 1360. They are required to maintain and protect the public health, welfare, safety, well-being, and tranquillity of their community. Certainly, adequate performance of their duty is not promoted by the presumption that whatever they do in this controversial field is unconstitutional. If the ebb and flow of competing public considerations is so apparent to this Court, solely gauged on a cold record, briefs and the argument of counsel, how much more so is it in the city council chamber itself, where all of the individuals concerned urge their manifold interests. The councilmen must live with their determinations and with those individuals affected by them. This Court has divided upon determination of many of such issues. So have councilmen. But should the fact of controversy give rise to a doctrine that whatever accord is reached is presumptively unconstitutional, a presumption that the agents of the state have failed to perform their sworn duty?

> "Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes of oppression and mischief."
>
> *Gaylord* v. *City of Pasadena*, 175 Cal. 433, 437, citing *In re Flaherty*, 105 Cal. 558, 562.

> "The validity of a law is not to be tested, however, by its application to extreme cases involving the assumption of grossly arbitrary violation of their duties by public officers. If every law were declared unconstitutional which by application of such a test could

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be shown capable of working injustice, we should have very few laws left."

Rode v. *Siebe*, 119 Cal. 518, 520-1.

The ruling of the state courts was that the complaint did not state a cause of action. The allegations were, in form, conclusions of law. Facts necessary to show that, under the circumstances, the presumption of constitutionality could not apply were not alleged, as required in

Pacific States Box & Basket Co. v. *White*, 296 U. S. 176.

Wilkins v. *San Bernardino*, 29 Cal. (2d) 332, 344.

Leventhal v. *District of Columbia*, 100 F. (2d) 94, 69 App. D. C. 229.

As heretofore pointed out (*Statement Opposing Jurisdiction*, etc., pt. IV, pp. 5-16), this Court approved judicially, as a comprehensive plan, the validity of a zoning ordinance containing the very distinction between zoning uses of which complaint is made herein in *Euclid* v. *Ambler Realty Co.*, 264 U. S. 292. It likewise held that the action of the council in classifying zones will not be disturbed, if the question whether the *plan* was unreasonable, arbitrary or an unequal exercise of power is fairly debatable.

As contradistinguished to the *comprehensive plan*, this Court established the doctrine that the application of the *plan* to the individual property could be judicially examined to determine, *on the basis of particular facts*, whether it was arbitrary or unequal.

Whitney v. California 274 U. S. 357 (burden is on assailants).

The appellant has not alleged any such facts, and hence no substantial Federal question is presented, since the ordinance is presumptively constitutional and no facts exist to show oppression, arbitrary or unequal application of the

laws, censorship, or any interference with religious belief and practice, *per se.*

Jones v. *Opelika*, 316 U. S. 584, 593, 596.
Reynolds v. *United States*, 98 U. S. 145, 166.
Cantwell v. *Connecticut*, 310 U. S. 296, 303, 304, 308.
Kovacs v. *Cooper*, 336 U. S. 77, 93 L. Ed. 379, 385 (note 10).
Martin v. *Strothers*, 319 U. S. 141, 143-4, 148, 151, 153, 155-156.
Saia v. *New York*, 334 U. S. 558, 562.
Prince v. *Massachusetts*, 321 U. S. 158, 166.
Murdoch v. *Pennsylvania*, 319 U. S. 105, 109.
Whitney v. *California*, 274 U. S. 357, 371, 373.

It is respectfully submitted that the *Petition for Rehearing* should be denied.

December 16, 1949.

CITY OF PORTERVILLE AND
ITS OFFICERS, *Appellees*,
By LEON THOMAS DAVID.

Of Counsel:

WALDO E. BURFORD,
WM. MACKENZIE BROWN.

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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 245.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah Corporation Sole, *Appellant*,

v.

CITY OF PORTERVILLE, a Municipal Corporation, et al, *Appellees.*

REPLY TO ANSWER TO PETITION FOR REHEARING.

PRELIMINARY STATEMENT.

The appellees in answer to the petition for rehearing rely upon this court's dismissal of the appeal, arguing that the court appraised the substantiality of the reasons advanced in support of the Porterville ordinance, and claiming that:

> "previous decisions of this court foreclose the subject and leave no room for inference that the questions sought to be raised can be the subject of the controversy under the Federal Constitution." (See page 2, Answer to Petition for Rehearing.)

May we respectfully ask, "What decisions?" Are there decisions which the court and appellees have knowledge of but have not been disclosed? Appellant's views are those of every appellate court (save the one in the instant case) passing upon the question[1], and the views generally accepted by text-writers.[2] So far as appellant is aware, in the only Supreme Court case even grazing this particular problem, this court carefully and expressly refrained from passing on the validity of an ordinance excluding churches as not being there in issue (*Euclid* v. *Amber Realty Co.*, 272 U. S. 365).

APPELLEES' ARGUMENTS IN THEIR ANSWER TO PETITION FOR REHEARING ARE MISLEADING AND DISTORT THE ISSUES.

Appellees attack the capacity of appellant, a corporation sole, to raise the constitutional challenge, asking "in what way is the corporation sole a *citizen* whose *privileges and immunities* are violated?" citing Stone, J., in *Hague* v. *C. I. O.*, 307 U. S. 496. This is most misleading. Appellant has not contended in any of its arguments either before this Court or the courts below that it is either a "*citizen*" or entitled to the protection of the "*privileges and immunities*" clause of the Federal Constitution. Its contention has been that the Porterville ordinance in restricting the freedom of religious worship is in violation of Section 1 of the Fourteenth Amendment, which under decisions of this Court have been held to embrace the fundamental rights guaranteed by the First Amendment, namely, free-

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[1] *City of Sherman* v. *Sims (Texas)*, 183 S. W.(2) 415, aff'g, 181 S. W.(2) 100; *Ellsworth* v. *Gercke (Ariz.)*, 156 Pac.(2) 242; *Roman Catholic Archbishop* v. *Baker (Ore.)*, 15 P.(2) 391; *State ex rel. Roman Catholic Bishop* v. *Hill (Nev.)*, 90 Pac.(2) 217; *State ex rel. Synod of Ohio* v. *Joseph (Ohio)*, 39 N. E.(2) 515, 138 A. L. R. 1274.

[2] 138 A. L. R. 1287; Bassett on Zoning, pp. 71-72; Yokley on Zoning Law and Practice (1948), Sec. 183.

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dom of religious worship and freedom of speech and of the press. As to the right of a corporation to challenge an invasion of these constitutional provisions, this Court has spoken in *Grosjean* v. *American Press Co.*, 297 U. S. 233, where there was challenged, under the due process clause of the Fourteenth Amendment, the validity of a state statute on the ground that it abridged the freedom of the press. It was argued that a corporation was without capacity to raise the constitutional question. The Court ruled (p. 244):

> "Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. *Paul* v. *Virginia*, 8 Wall. 168. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 592; *Smyth* v. *Ames*, 169 U. S. 466, 522."

This case has never been departed from so far as we are aware. See *United States* v. *C. I. O.*, 335 U. S. 106, 121-124, and the following from the concurring opinion of Mr. Justice Rutledge, p. 154:

> ". . . There are of course important legal and economic differences remaining between corporations and unincorporated associations, including labor unions, which justify large distinctions between them in legal treatment. But to whatever extent this may be true, it does not follow that the broadside and blanketing prohibitions here attempted in restriction of freedom of expression and assembly would be valid in their corporate applications. Corporations have been held within the First Amendment's protection against restrictions upon the circulation of their media of expression. *Grosjean* v. *American Press Co.*, 297 U. S. 233. It cannot therefore be taken, merely upon legislative assumption, practice or judgment, that restrictions upon freedoms of expression by corporations are

valid. Again, those matters cannot be settled finally until this Court has spoken."

In the event persons who desired and planned and wanted to use the church edifice themselves brought this suit, instead of the Corporation of the Presiding Bishop, manifestly they would have had no status, standing, or interest to enjoin the refusal of the building permit, since they were not applicants for that permit. *Gundling* v. *Chicago,* 177 U. S. 183, 186. The corporation itself is the owner of the property and itself seeks to establish the property for religious uses and purposes. And the question is whether a religious building such as this may be established in a portion of the City of Porterville, or whether the city can exclude it from particular areas. A religious edifice has every bit as much to do with freedom of religion as does the distribution of religious literature. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108-9, 117. If there is status and standing to raise the question in the latter instance, there is such status and standing with respect to our case.

Appellees argue that the zoning ordinance did not purport to prohibit anyone worshipping, dictate his belief, censor it, etc. Appellees profess inability to see how the prohibition of churches could affect the freedom of religious worship. If the ordinance absolutely prohibited construction of churches in the entire city, would there be any escaping the fact of its interference with religious worship? If the answer be no, will the mere difference that building churches is prohibited in only part of the city, a distinction in *degree* rather than principle, save the ordinance from the same fatal flaw? Can a law be considered valid because it is *just a little* unconstitutional or unconstitutional only to the extent it undertakes to exercise forbidden powers? Here churches, the conventional and orthodox tool of customary worship, are eliminated from the very district with which from time immemorial they have been most

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closely associated. Yet this Court has held in no uncertain terms that *less* conventional and orthodox ways of worship cannot be so restricted. *Murdock* v. *Pennsylvania,* supra.

Appellees assert that it is appellant's position that church buildings be exempted from nondiscriminatory ordinances for public safety and welfare; that appellant's argument if extended would prevent prohibitions against wooden buildings and fire escapes, inadequate ventilation, etc. Appellees further argue that if churches must be permitted, police, fire and sanitary facilities, street paving and parking would not be adequate, and that more expensive police details, larger water and sewer mains, additional water pressures, erection of costly facilities, employment of more personnel would be required. Further in this line, appellees paint a church as a monstrous industrial plant, and picture in glowing terms "bodies of people coming and going", "noise, dust; and traffic", "fumes, flashing of lights and peaks of congestion" (Page 7, Appellees' Answer to Petition for Rehearing).

But if common knowledge is not enough to dispel such a picture as regards a church, the court need only look at the building plans submitted and the map of the City of Porterville. There is no support for such arguments in the record—the case was disposed of below on demurrer to appellant's petition.

And the argument that appellant claims exemption from safety provisions, such as fire hazards, etc., is repudiated by the record. The petition for writ of mandate alleged that the plans and specifications conformed in all respects to the requirements of the Building Code of the City of Porterville, and that the proposed building complied in every particular with such requirements. It was further alleged that the refusal to issue the building permit was for the specific reason that the property where the church was to be located was zoned for single-family dwellings.

While immaterial to the question of the substantiality of the Federal question, appellees also urge that the com-

plaint did not state a cause of action because containing conclusions of law. The specific constitutional provisions relied upon were contained in the complaint to bring the constitutional challenge to the attention of the court at the earliest moment. Every fact necessary for the determination of the constitutionality of the ordinance was pleaded. The decisions cited to support the contention that the complaint was insufficient are not in point. None of these decisions embodied a general challenge to the constitutionality of the respective statutes in question, but merely challenged their applicability to the particular assailant's particular property or set of facts. For example, in *Pacific States Box Co.* v. *White*, 296 U. S. 176, the decision dismissing the bill for not stating a cause of action, was based upon the fact that the challenged law was clearly and admittedly within the police power of the state, under which circumstance this court held that the burden was upon one assailing such a law to show "by a resort to common knowledge or other matters which may be judicially noticed, or other legitimate proof that the action [applying the law in the particular case] is arbitrary." Such a burden was not sustained by making general allegations which were merely general conclusions of law. In *Wilkins* v. *San Bernardino*, 29 Cal. 2d 322, the court specifically pointed out that no claim was advanced that the ordinance itself was invalid, but invalid only as applied to plaintiff's property; the same situation obtains in *Leventhal* v. *District of Columbia*, 100 F. 2d 94. The case at bar, unlike those cases cited, is a direct challenge to the power of a municipality to prohibit churches in residential sections of a city. In other words, the constitutionality of the ordinance as applied to churches is brought into question and not merely the application of the ordinance to appellant's particular property. Must appellant when challenging a statute which on its face restricts religious freedom negative every possible factual situation that the imagination of appellees could conjure as possibly justifying the statute as necessary to prevent a

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clear and present danger of serious substantive evil? The cases do not so hold.

It is respectfully submitted that the Petition for Rehearing should be granted.

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No. 245. CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS *v.* CITY OF PORTERVILLE ET AL. Appeal from the District Court of Appeal, 4th Appellate District, of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *W. Glenn Harmon* for appellant. *Leon Thomas David* for appellees. Reported below: 90 Cal. App. 2d 656, 203 P. 2d 823.